INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	3
Statement	3
1. The companies involved	4
2. The sodium chlorate market	6
3. The joint venture in its commercial setting	7
4. The decision of the district court	11
The question is substantial	14
1. The Clayton Act violation	16
2. The Sherman Act violation	23
Conclusion	25
Appendix	1a

CITATIONS

Cases:	
Aluminum Co. of America v. *Federal Trade Commission*, 284 Fed. 401	22
Associated Press v. *United States*, 326 U.S. 1	15
Brown Shoe Co. v. *United States*, 370 U.S. 294	23, 24
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593	15
United States v. *Aluminum Co. of America*, 148 F. 2d 416	24
United States v. *du Pont & Co.*, 353 U.S. 586	2
United States v. *Imperial Chemical Industries*, 100 F. Supp. 504	15
United States v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947	15
United States v. *Pan American World Airways, Inc.*, 193 F. Supp. 18, reversed on other grounds, 371 U.S. 296	15

Cases—Continued	Page
United States v. *Patterson*, 59 Fed. 280	24
United States v. *Philadelphia Nat. Bank*, 374 U.S. 321	23
United States v. *Singer Mfg. Co.*, 374 U.S. 174	2
United States v. *United Shoe Machinery Co.*, 247 U.S. 32	24
Statutes:	
Clayton Act, Section 7, 38 Stat. 731, as amended, 15 U.S.C. 18	3, 11, 14, 16, 17, 21, 22, 23, 24
Sherman Act, Section 1, 26 Stat. 209, as amended, 15 U.S.C. 1	3, 14, 23
Miscellaneous:	
Comment, *Joint Subsidiaries and Section 7 of the Clayton Act*, 39 U. Det. L.J. 223, citing Merrill Lynch, Pierce, Fenner & Smith, *Chemicals* (1958)	14
Dixon, "*Joint Ventures: What is their Impact on Competition?*" 7 Antitrust Bull. 397	14
Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 Va. L. Rev. 927	15
Kaysen & Turner, *Antitrust Policy*	14
Note, *Joint Ventures and Section 7 of the Clayton Act*, 14 Stan. L. Rev. 777	15
Note, *The Corporate Joint Venture under the Antitrust Laws*, 37 N.Y.U.L. Rev. 712	15
Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 ABA Antitrust Sec. Rep	15

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

PENN-OLIN CHEMICAL COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court, constituting its findings of fact and conclusions of law (App., *infra*), is reported at 217 F. Supp. 110.

JURISDICTION

On May 15, 1963, the district court entered judgment dismissing the government's amended complaint (App. 56a). The United States filed a notice of appeal on July 15, 1963. The district court on September 9, 1963, extended the time for docketing this appeal to and including September 27, 1963. Section 2 of the Expediting Act, 32 Stat. 823, as amended,

15 U.S.C. 29, vests this Court with jurisdiction to review the judgment on direct appeal. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174; *United States* v. *du Pont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

Olin Mathieson Chemical Corporation and Pennsalt Chemicals Comporation jointly formed the Penn-Olin Chemical Company to produce and market sodium chlorate in the southeastern United States. The district court found that each of the parent companies had an extensive background in sodium chlorate; each had evinced long-standing interest in the possibility of entering the southeastern market as an independent competitor; each had available a suitable plant site; each had the resources and general capability needed to build its own plant in the southeast and had determined that an individually owned plant could be operated with profit; and acting independently each could have effectively competed in the southeastern market if it had wished to do so. The question presented is: whether the joint venture, which was entered into while each of the companies still had under consideration plans for independently entering the market, was a combination in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, and involved an acquisition the effect of which may be substantially to lessen competition in violation of Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is hereby declared to be illegal * * *.

The relevant portion of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, provides:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a direct appeal from a final judgment of the district court (Steel, J.) dismissing after trial a civil antitrust action brought by the United States. The government's amended complaint charged violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act. It alleged that Olin Mathieson Chemical Corporation ("Olin") and Pennsalt Chemicals Corporation ("Pennsalt"), through the joint formation of the Penn-Olin Chemical Company ("Penn-Olin") to produce and market sodium chlorate, had, *inter alia*, eliminated potential competition between

themselves in the production and sale of sodium chlorate. The pertinent facts, most of which are taken from the district court's findings, are as follows:

1. THE COMPANIES INVOLVED

Olin is a large, diversified industrial corporation, which was formed in 1954 by the merger of Olin Industries, Inc. and Mathieson Chemical Corporation (App. 4a). Its chemical division, one of seven operating divisions, produces a wide range of chemicals and chemical products in plants located in 15 states, and accounts for about 30 percent of Olin's operating revenues (App. 4a). In 1960 Olin's net sales of chemicals and chemical products were $217 million; its total sales amounted to $690 million; its assets totaled $860 million; and it made capital expenditures of almost $49 million (App. 5a).

In the early 1930's one of Olin's predecessors produced sodium chlorate for its internal use (App. 13a). Olin itself, however, has never engaged in commercial production of this chemical, although it purchases sodium chlorate for its own use (App. 13a, 29a, and fn. 19). Its patented "Mathieson process" for bleaching pulp, which consumes sodium chlorate, is widely used by paper manufacturers under royalty-free licenses (App. 12a–13a, and fn. 5).

Pennsalt has been engaged in the chemical business for more than 110 years (App. 4a). Its sole activity is the production and sale of chemicals and chemical products throughout the United States (App. 3a–4a).

In 1960 Pennsalt's sales were more than $90 million, and it had assets of approximately the same amount (App. 4a). Since 1958 it has been engaged in a $55 million modernization and expansion program (App. 4a).

Since 1941 Pennsalt has produced sodium chlorate at a single plant in Portland, Oregon (App. 11a). The capacity of the Portland plant has steadily been increased from 2,194 tons per year in 1941 to 15,392 tons in 1959 (App. 11a). Most of Pennsalt's sales of sodium chlorate have been to users located west of the Rocky Mountains (App. 11a), although in 1960 Pennsalt shipped 4,186 tons of the chemical, amounting to 27 percent of its total sodium chlorate sales that year, into the southeastern United States (App. 21a). Of these shipments into the southeast 3,203 tons were sold for Pennsalt by Olin, acting as Pennsalt's sales agent under a contract of December 1957 (App. 21a; see *infra*, pp. 10-11).

Penn-Olin was organized on February 25, 1960, pursuant to a joint venture agreement between Olin and Pennsalt dated February 11, 1960 (App. 5a). Pennsalt and Olin each own one-half of the capital stock of Penn-Olin, and the directors and officers of the joint subsidiary are also divided equally between the two parents (App. 5a).

Penn-Olin commenced operations on September 1, 1961, in a plant located at Calvert City, Kentucky (App. 5a). The plant was built at a cost of about $6.5 million and has the capacity to produce 26,500 tons of sodium chlorate per year (App. 5a). By an

agreement of October 1961 Pennsalt has undertaken to operate the plant, and Olin has assumed responsibility for sales (App. 5a).

2. THE SODIUM CHLORATE MARKET

Sodium chlorate is produced commercially by the electrolysis of an acidified solution of sodium chloride (salt) (App. 7a). All sodium chlorate of like purity is fungible and can be used interchangeably (App. 8a). In 1960, 91,900 tons of the chemical, valued at around $18 million, were produced domestically; 54,600 tons east of the Rocky Mountains, and 37,300 tons in the west (App. 8a).

Sodium chlorate has various uses. Firms in the pulp and paper industry, which consumes most of the domestic production (64 percent in 1960), use sodium chlorate as a raw material in the production of a pulp bleaching agent (chlorine dioxide) (App. 8a–9a). Sodium chlorate is also employed in the production of weed control herbicides, agricultural chemicals, and certain derivatives such as ammonium perchlorate (App. 8a, 9a).

Prior to the formation of Penn-Olin three producing companies, Pennsalt, American Potash & Chemical Corporation ("AmPot"), and Hooker Chemical Corporation ("Hooker"), or their predecessors, made up the domestic sodium chlorate industry (App. 9a). The two most important domestic markets served by these companies were the southeastern and western United States (App. 17a). Only Pennsalt and AmPot have plants in the west (App. 16a). Hooker's predecessor had constructed a plant in the southeast (at

Columbus, Mississippi) in 1954, the capacity of which almost doubled between 1957 and 1960 (App. 9a, 10a). AmPot authorized construction of a plant at Aberdeen, Mississippi, in 1957 to meet the growing demand in the southeast and to enable it to compete effectively in that area with Hooker's Columbus plant (App. 10a). The Aberdeen plant was in operation by 1959, and in 1961 its capacity was increased by 50 percent to 22,500 tons per year (App. 10a).

Hooker, the largest of the three companies, entered the industry in 1956 when it acquired Oldbury Electro Chemical Company, which had been producing sodium chlorate since the turn of the century (App. 9a). Hooker has two plants: the one at Columbus, having a 32,000-ton capacity in 1960, and one at Niagara Falls, New York, having a capacity of 18,000 tons (App. 9a–10a). AmPot also has two plants, which had the following capacity in 1960: Henderson, Nevada (27,000 tons), and Aberdeen, Mississippi (15,000 tons) (App. 10a). After the formation of Penn-Olin and the institution of this action, Pittsburgh Plate Glass Company announced plans to construct a 15,000-ton-per-year sodium chlorate plant at Lake Charles, Louisiana (App. 12a). Pacific Engineering & Production Company also began constructing a 5,000-ton capacity sodium chlorate plant at Henderson, Nevada, which presumably commenced production in late 1962 (see App. 12a).

3. THE JOINT VENTURE IN ITS COMMERCIAL SETTING

In the late 1950's the only producers of sodium chlorate in the United States were Hooker, AmPot,

and Pennsalt. No new firms had entered the industry in a decade (App. 33a); prices were stable (PX 254, 11);[1] and little effort had been made to expand existing uses or to develop new ones (PX 146, p. 2).

During the 1950's the sodium chlorate market began to grow, chiefly because of the adoption and rapid expansion of chlorine dioxide bleaching in the pulp industry (App. 9a). This expansion was attributable primarily to the efforts of Olin and Allied Chemical Corporation (Solvay Division) in granting royalty-free licenses to pulp and paper manufacturers under their patented processes for the generation of chlorine dioxide (App. 11a, 13a, fn. 5).[2] The market growth has been most pronounced in the southeast. By 1960 that area had the heaviest concentration of sodium chlorate buyers, of which the pulp and paper mills were by far the largest, and represented nearly half the national sodium chlorate pro-

[1] Government exhibits are referred to as "PX" (plaintiff's exhibit), to conform with the designation used in the court below. The exhibits cited herein are PX nos. 32, 56, 60, 100, 146, 154, 188, 189, 197, 205, 215, 226, 232, 245, 254, 286, 306, 309, 313, 316, 317, 320, 322, 323, 324, 336, 337, 338, 392 (pp. 277–278, 313–318, 353); 394 (p. 71), 399 (pp. 101–103), 401 (pp. 29–30), 402 (p. 64), 406 (pp. 169–170), 408 (pp. 75–76), and 414. They were offered into evidence at Tr. 139, 141, 143, 145, 147–155, 163, 172–174, 176–182, 189, 196, and were admitted by the court at Tr. 189 and 196, subject to objections by defendants in their briefs. No such objections were made.

[2] By 1960, most of this chlorine dioxide—100 percent in the west, and around 60 percent in the remainder of the country—was being produced under Olin Mathieson's process (App. 11a–12a; PX 188, PX 245). Pennsalt, which installed the Mathieson process in western paper mills under a 1958 agreement with Olin (see fn. 3, *infra*), supplied 100 percent of the sodium chlorate used by those mills in 1960 (App. 12a).

ductive capacity (App. 17a). In that year the southeastern market was divided among the three producers in the following proportions: Hooker (49.5 percent), AmPot (41.6 percent), and Pennsalt (8.9 percent) (App. 28a).

Prior to the joint venture, both Pennsalt and Olin had long been interested in entering, as individual producers, the rapidly growing southeastern sodium chlorate market. Pennsalt made cost studies for a plant at Calvert City, Kentucky, as early as 1951, and from 1955 on had given almost continuous consideration to the establishment of a plant in the southeast (App. 35a). Despite favorable reports, however, and a belief that it could obtain at least a 15.9 percent return on its total investment (PX 100; see App. 37a–38a, fn. 23), Pennsalt was doubtful as to the adequacy of the return (Tr. 636–687). Its uncertainty persisted through 1959 when decision on whether to build a combined ammonium perchlorate-sodium chlorate plant was postponed; the unilateral project was to be reconsidered only if "Olin [was] not desirous of proceeding further with [a] joint venture" then under discussion (PX 154, p. 2, PX 392, pp. 313–318). No final decision had been made at the time of the creation of Penn-Olin (see App. 36a–37a, and fn. 22).

Beginning in the 1950's, Olin, too, investigated the possibility of establishing a sodium chlorate plant in the eastern United States, and conducted various surveys and experiments toward that end (App. 35a). As late as October 1959 Olin's chemical division recommended construction of a 15,000-ton sodium

chlorate plant at Chattanooga, Tennessee, predicting a 13.1 percent return on gross investment after taxes (PX 32, p. 18, and revised pp. 50, 51). The basis for this recommendation was, *inter alia*, that demand for sodium chlorate would outstrip industry capacity by 1962 and had already done so in the southeast, and that Olin's projected market in the paper industry would net it about one-third of the southeastern tonnage (around 14,000 tons per year) (PX 32, p. 18). The chemical division felt that an independent plant was "definitely more of a possibility than it had been previously" (Tr. 474–477). Pennsalt, however, later came up with "new facts" in support of the joint venture, and Olin's management never finally decided to accept or reject the division's recommendation (Tr. 486; see App. 36a and fn. 22).

During the years when Pennsalt and Olin were conducting independent studies as to the feasibility of building their own plants, they also were having discussions about entering the southeastern market by means of some joint arrangement (App. 36a). The first such arrangement was a sales agreement of December 1957, which was aimed, in part, at testing jointly the southeastern market (App. 48a).[3] Under this agreement Pennsalt contracted to make available to Olin, as an exclusive seller, 2,000 tons of sodium chlorate per year for two or three years; and Olin agreed to sell the chemical "only to pulp and paper mills in the southeast," except for one company

[3] Previously (in 1953) the parties had entered into a licensing agreement, not related to the southeast, under which Olin promised to grant immunity from infringement suits to any pulp company designated by Pennsalt to use the Mathieson bleaching process (App. 11a; PX 60).

(Buckeye Cellulose Company of Foley, Florida) which Pennsalt "reserved the right to serve directly" (App. 48a).

The second joint arrangement was a so-called production agreement dated February 3, 1958, in which each agreed that "neither * * * should move in the chlorate or perchlorate field without keeping the other party informed," and each bound itself "to bring to the attention of the other any unusual aspects of this business which might make it desirable to proceed further with production plans" (App. 53a).

These agreements were in force until superseded by the joint venture arrangement of February 11, 1960 (see App. 48a). Formation of the joint venture was promptly announced in the hope that other potential competitors might thereby be deterred from entry and "the market might be preempted" (App. 33a).

4. THE DECISION OF THE DISTRICT COURT.

The district court found that the government had not shown that the effect of the joint venture "may be substantially to lessen competition" in violation of Section 7 of the Clayton Act.[4] It disregarded the Sherman Act challenge, noting merely that "the anti-competitive standard imposed by Section 7 of the Clayton Act is less stringent than that of the Sherman Act" (App. 6a–7a). The parties had stipulated that sodium chlorate was an appropriate line of commerce

[4] Finding no violation, the court did not pass upon the disputed issue of Clayton Act coverage—*i.e.*, whether the joint formation of Penn-Olin involved an "acquisition" of the stock or assets of a corporation "engaged * * * in commerce" (see App. 6a). This question is discussed *infra*, pp. 21–23.

(App. 7a), and that the southeastern United States was a relevant geographic market (App. 14a).[8] The court rejected the government's further contention that there was also a national market in sodium chlorate (App. 24a), and we do not press that claim here. In the southeastern market, the court found that Pennsalt and Olin had never been actual competitors (App. 26a).

The principal issue was whether the joint venture was unlawful in that it eliminated the potentiality of competition between Pennsalt and Olin in the southeastern market. On that point the court found that Pennsalt and Olin each had an extensive background in sodium chlorate (the former in manufacturing and selling, the latter in selling to the chief purchasers, as well as in the technical aspects of bleaching pulp) (App. 35a, 37a); that each had evinced long standing interest in independently entering the southeastern market (App. 34a–35a); that each possessed the resources and general capability needed to build its own plant in the southeast (App. 37a); and that the forecasts of each company indicated that an independently operated plant could be operated with profit (App. 37a–38a, and fn. 23). In addition, the court found that both Olin and Pennsalt could have been effective independent competitors of Hooker and

[8] There was some dispute between the parties as to which states made up the southeastern market. The court found that the market consisted of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia (App. 14a, fn. 6).

AmPot in the southeast (App. 37a). Finally, the court rejected Pennsalt's assertion that prior to the joint venture it had made a final decision not to enter the market alone (App. 36a).

However, the court ruled that potential competition between Pennsalt and Olin would be foreclosed only if the government proved that "as a matter of probability *both* companies would have entered the market as individual competitors" in the absence of the joint venture (App. 38a). Finding no evidence that Pennsalt and Olin would have *simultaneously* determined to build their own plants or that the construction of a plant by one would not have discouraged the other, the court concluded the best that could be said for the government's case was "that one company would have decided to build while the other continued to ponder" (App. 38a–39a).

As to the impact of the joint venture upon competition in the market generally, the court found that since the joint subsidiary would be a more effective competitor than either Pennsalt or Olin individually, the likely effect of the collaboration would be to increase, rather than diminish, competition (App. 41a–43a). The court also rejected the argument that the joint venture would impair the parties' existing competitiveness in other nonchlorate chemicals[8] (App. 47a). Finally, the court ruled that the parties' sales and production agreements (see pp. 10–11, *supra*) were neither *per se* unlawful, nor unlawful as part of

[8] Calcium hypochlorite was stipulated as the relevant nonchlorate line of commerce (App. 7a, and fn. 3). If probable jurisdiction is noted, we may argue that the joint venture also had the prohibited anticompetitive impact upon this line of commerce.

a larger course of action culminating in the joint venture (App. 44a, 53a, 55a).

THE QUESTION IS SUBSTANTIAL

This important antitrust case presents a novel question as to the standards governing the legality, under Section 7 of the Clayton Act and Section 1 of the Sherman Act, of "joint ventures" between industrial corporations.

Joint ventures of the Penn-Olin type—corporations whose stock is owned by two or more companies—are rapidly becoming a significant form of business association. In the chemical industry alone, 17 of the 54 leading corporations held interests, in 1958, in one or more joint subsidiaries.[7] Olin, for example, itself the outgrowth of a 1953 joint venture between Mathieson Chemical Corporation and Olin Industries, Inc. (PX 414, ¶¶ 35, 37), joined forces with Revere Copper & Brass, Inc. in forming the $250 million Ormet Corporation (and related subsidiaries) in 1956, and with Sun Oil Company, in establishing the $7 million SunOlin Chemical Company in 1958 (PX 414, ¶ 40). Pennsalt, too, in 1954 formed the Solar Salt Company primarily in conjunction with Hooker (PX 414, ¶ 42).

While the antitrust problems posed by this relatively recent phenomenon have received the attention of commentators,[8] the courts have had little occasion

[7] Comment, *Joint Subsidiaries and Section 7 of the Clayton Act*, 39 U. Det. L.J. 223, 224, citing Merrill Lynch, Pierce, Fenner & Smith, *Chemicals* (1958).

[8] See, *e.g.*, Kaysen & Turner, *Antitrust Policy*, pp. 136–141; Dixon, "*Joint Ventures: What is their Impact on Competition?*,"

to appraise the economic consequences of joint ventures. This Court has considered the question only in situations where it appeared that an explicit purpose of the venture was to restrain competition (*Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593), or where the great power of the combination as a competitive weapon raised questions as to the propriety of the terms upon which competing non-members were permitted to participate (*Associated Press* v. *United States,* 326 U.S. 1). The experience of the lower courts has been similarly confined. See *United States* v. *Imperial Chemical Industries,* 100 F. Supp. 504 (S.D. N.Y.); *United States* v. *Minnesota Mining & Mfg. Co.,* 92 F. Supp. 947 (D. Mass.). Cf. *United States* v. *Pan American World Airways, Inc.,* 193 F. Supp. 18, 31–36 (S.D. N.Y.), reversed on other grounds, 371 U.S. 296. In the instant case the Court is called upon for the first time to determine the extent to which firms fully capable of entering a market independently, and interested in doing so, may choose instead to consolidate their efforts and occupy the market jointly, thereby permanently foreclosing the competition which each might otherwise have given the other as well as the companies already in the field.

---

7 Antitrust Bull. 397; Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws,* 42 Va. L. Rev. 927; Rahl, *Applicability of the Clayton Act to Potential Competition,* 12 ABA Antitrust Sec. Rep., p. 128; Note, *The Corporate Joint Venture under the Antitrust Laws,* 37 N.Y.U.L. Rev. 712; Note, *Joint Ventures and Section 7 of the Clayton Act,* 14 Stan. L. Rev. 777; fn. 7, *supra.*

706-441—63——2

1. THE CLAYTON ACT VIOLATION

(a) Section 7 of the Clayton Act provides:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The district court properly recognized (App. 40a–41a) that the "lessening of competition" standard requires a comparison between the competitive situation brought about by the challenged transaction and the situation which, with reasonable probability, would have existed had the transaction not occurred. The relevant question, in its view, was whether there was a reasonable likelihood that both Pennsalt and Olin would, but for the decision to collaborate, have constructed independent plants in the southeast; if so, the joint venture, by foreclosing that potential competition, violated the Act. In appraising that likelihood, the court found that each company had the experience, the resources, and the general capability needed to build its own plant in the southeast and to compete in that market; each could have done so had it wished; each had a suitable plant site available; each had long been interested in the possibility of individual entry and still maintained that inter-

est right up to the time the joint venture was launched; and each forecast that it could operate in the southeast at a profit. Despite these findings, however, the court upheld the joint venture. Leaving open the question whether Pennsalt or Olin, considered individually, would probably have constructed a plant, the court emphasized that there was no evidence both companies would *simultaneously* have decided to enter the field or that the prior entry of one would not have deterred the other. Thus, it concluded, the "best possible postulate on which the Government's case can be based is that one company would have decided to build while the other continued to ponder" (App. 39a).

We take no issue with these findings of the district court, which are amply supported by the record. The findings, however, permit only one conclusion—that the formation of Penn-Olin constituted a violation of Section 7. To establish a reasonable probability that the joint venture had the proscribed anticompetitive effect, it was sufficient to show that each of the parent companies whose entry was foreclosed was capable of going into the southeastern market on its own and had seriously considered that possibility as an alternative to the joint venture. In insisting that the government go further and prove that neither company would have lost interest had it been "beaten to the punch" by the other, the court below adopted a wholly unrealistic and erroneous standard. Such a prediction would have been a matter of sheer speculation, especially since "[n]either company had ever faced the prob-

lem" and therefore the record afforded "no clue as to what action might have been taken if the problem had arisen" (App. 39a).

The evidence adduced by the government, showing capability plus interest, demonstrated to the degree of probability required by the statute that both Pennsalt and Olin might, in the long run if not immediately, have built a plant in the southeast. But even if the district court were correct in its view that the most favorable assumption was "that one company would have decided to build while the other continued to ponder," that hypothesis, without more, would be enough to condemn the joint venture. The formation of the joint subsidiary not only precluded the immediate entry of one of the parents, but also eliminated the prospect that the other parent, waiting in the wings, might have come into the market at some future time when competitive conditions invited. The very presence of one of the parents as a watchful potential, but not actual, competitor is a source of protection for purchasers and ultimately the consuming public. For its readiness to enter the market whenever the existing manufacturers charge excessive prices, limit production, or fail to exploit economic opportunities (*e.g.*, to develop more efficient productive techniques), acts as a spur to insure the competitive vigor of those already in the market.

The competition foreclosed by the joint venture was clearly substantial. At that time, only two companies, Hooker and AmPot, had plants in the southeast. Both Pennsalt and Olin were considering, and were

capable of, building plants with a capacity of at least 15,000 tons per year (see PX 32, p. 18, PX 100), an amount equal to AmPot's 1960 capacity in its only southeastern plant (Aberdeen, Mississippi). Moreover, the potential entrants each showed promise of becoming a vigorous competitor in this sluggish industry. In 1958, a Pennsalt analysis offered the following reasons in support of independent entry into the southeastern market (PX 146, p. 2):

> 4. As the newest producer, Pennsalt should and could take leadership in (1) promoting sales aggressively, (2) extending existing uses, (3) developing new uses, (4) improving use technology.

Olin, prior to entering the sodium chlorate market, had waged a vigorous campaign to enhance the already widespread acceptance of its chlorine dioxide process by the paper industry (see p. 8 and fn. 2, *supra*). And it considered the production of sodium chlorates as a means whereby it could "get a return on the effort put into chlorine dioxide generation installations" (PX 254, introduction, ¶b).

Indeed, the formation of Penn-Olin, and the assignment of specialized sales and production functions to the two parents, caused a discontinuance of creative experiments both were already making in the sodium chlorate field. Pennsalt had been conducting experiments to develop new uses for sodium chlorate in textile bleaching, but did not look forward to continuing if it were not given sales authority for Penn-Olin; Olin was later selected as a joint subsidiary's sales

agent (PX 215, PX 399, pp. 101–103). Olin, which had not been assigned the task of handling Penn-Olin's production, cancelled its efforts to produce sodium chlorate at a lower cost (PX 56, p. 4, PX 401, pp. 29–30, PX 406, pp. 169–170).

It should be emphasized, finally, that this is not a case in which two companies have combined their resources in order to overcome substantial barriers to independent entry or to share risks or expenses too great to be borne by either company alone. Such collaborations, characteristic of infant or speculative industries where bold innovation or pioneering research is required, present a more difficult case. But whatever might be said in justification of a joint venture in those circumstances plainly cannot be said here. Sodium chlorate is a long-established industry already occupied by two other major companies. The Penn-Olin plant is not unusual in design or operation. Production of the chemical was a logical extension of the past business of each parent. And the southeastern area was one in which demand for additional sodium chlorate was already known to exist.

In sum, the effect of the Penn-Olin joint venture was "substantially to lessen competition" in the production and sale of sodium chlorate in the southeastern United States.

(b) There remains, under Section 7, a further question not reached by the court below, *i.e.*, whether the formation of Penn-Olin amounted to an acquisition of stock in "another corporation engaged * * * in commerce * * *." That statutory requisite, we submit, was clearly satisfied. Penn-Olin was organized for the sole purpose of engaging in interstate commerce, and from the moment of its inception there was no time in which it was not producing and selling chemicals in commerce or actively preparing to do so.

The joint subsidiary was incorporated on February 25, 1960, pursuant to an agreement between the parents reached two weeks earlier (App. 5a). Pennsalt and Olin, each of which was eventually to acquire a total of 500 shares, purchased one share apiece on March 22, 1960, and an additional 75 shares in November 1960 (PX 306, PX 317, PX 320). Each did not purchase its remaining 424 shares, however, until 1961 (200 in January, 100 in February, and 124 in March (PX 309, PX 313, PX 316, PX 322–PX 324)). Meanwhile, even prior to Penn-Olin's incorporation, freight rate studies, site location studies, and technological investigations had been undertaken on its behalf (*e.g.*, PX 189, PX 197, PX 205). While the parents still had only one share apiece, the subsidiary began its sales development efforts, and solicited sales (PX 226, PX 232, pp. viii–x, PX 408, pp. 75–76). Actual sales commenced in January 1961 (PX 286, PX 336–PX 338). It is plain, therefore, that Penn-Olin was "engaged in commerce," within the meaning of Section 7, both before and during the

period in which Pennsalt and Olin were acquiring its stock. Cf. *Aluminum Co. of America* v. *Federal Trade Commission*, 284 Fed. 401, 408 (C.A. 3) (holding that the acquisition by Alcoa of a new corporation formed to take over part of the existing operations of a different company violated Section 7).

A contrary conclusion would wholly vitiate the congressional purpose, expressed in the amended Section 7, to limit corporate expansion through mergers. In practical effect, the joint venture here, like any merger, amounted to a combination of the existing assets of two corporations. Indeed, a member of Penn-Olin's board of directors considered the joint subsidiary as a vehicle by means of which "Pennsalt would use its own employees and Olin its own existing sales people to carry out the functions of the Penn-Olin Company" (PX 394, p. 71). The president of each of the parents likewise regarded the joint subsidiary as a mechanism by which some of the assets of both companies would be combined.[8] Plainly, a pooling of resources with the proscribed anti-competitive effect cannot gain immunity from Section 7 merely because it is accomplished, not through the

[8] Pennsalt's president felt his company would be "utilizing an asset [Olin's sales organization] which our partner has in this venture," and stated that Pennsalt's contribution to the joint venture would be its "manufacturing know-how and experience in operating the plant" and that Olin would contribute "its assets in terms of sales, technical service and the like" (PX 392, pp. 277–278, 353). Olin's president believed that his company, by "contributing dollars and our marketing ability * * * would be buying in the joint venture Pennsalt's years of experience * * * and their operating know-how * * *" (PX 402, p. 64).

acquisition of the stock or assets of one existing company by another, but rather through a joint acquisition of stock in a new entity to which both companies transfer their assets. To hold otherwise would be to encourage "evasive transactions" resulting in a "blunting of the antimerger thrust of the section." Cf. *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 346.

2. THE SHERMAN ACT VIOLATION

The district court, concluding that the formation of Penn-Olin did not violate the Clayton Act, did not discuss the further issue whether it violated the Sherman Act. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 329 (App. 6a–7a). If this Court agrees with us that the joint venture was an offense under Section 7, the question of its legality under Section 1 of the Sherman Act need not be reached. However, if the Court were to conclude that the transaction did not come within Section 7 because Penn-Olin was not "engaged * * * in commerce" at the time its stock was acquired, the Sherman Act issue would have to be decided.

The same considerations, we submit, which compel the conclusion that the joint venture had the anticompetitive effect proscribed by Section 7, also condemn the arrangement as a contract or combination "in restraint of trade or commerce" under Section 1 of the Sherman Act. Although the 1950 amendments to the Clayton Act promulgated a "standard of illegality stricter than that imposed by the Sherman Act" and were intended to arrest monopolistic tendencies "in their incipiency and well before they

have attained such effects as would justify a Sherman Act proceeding * * *" (see *Brown Shoe Co., supra,* fn. 33, at 319), we believe that the concerted action involved here violates both standards. The Sherman Act, like the Clayton Act, outlaws restraints of potential as well as of actual competition. *United States* v. *Patterson,* 59 Fed. 280, 283 (Mass.). See *United States* v. *United Shoe Machinery Co.,* 247 U.S. 32, 53. So far as the public interest is concerned, stated Judge Learned Hand in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429 (C.A. 2):

> it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented.

The anticompetitive consequences of this combination do not turn upon the form in which it took place, *i.e.,* that the joint venture was accomplished through the creation of a jointly-owned subsidiary rather than by a merger or other direct combination. The critical question is the effect of the combination upon competition, and the arguments we have developed in showing that this arrangement violates the substantive anticompetitive standards of Section 7 of the Clayton Act also establish that it violates the Sherman Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ROBERT B. HUMMEL,
LIONEL KESTENBAUM,
GEORGE R. KUCIK,
Attorneys.

SEPTEMBER 1963.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 2282

UNITED STATES OF AMERICA, PLAINTIFF

v.

PENN-OLIN CHEMICAL COMPANY, OLIN MATHIESON CHEMICAL CORPORATION AND PENNSALT CHEMICALS CORPORATION, DEFENDANTS

OPINION

ALEXANDER GREENFELD, Esquire, and LEONARD G. HAGNER, Esquire, District of Delaware, Wilmington, Delaware; DANIEL J. FREED, Esquire, and EDWARD A. COPLEY, Esquire, Justice Department, Antitrust Division, Washington, D.C., attorneys for United States of America.

WILLIAM S. POTTER, Esquire (Berl, Potter & Anderson), Wilmington, Delaware, for all defendants; H. FRANCIS DELONE, Esquire, and JOHN T. SUBAK, Esquire (Dechert, Price & Rhoads), Philadelphia, Pennsylvania, attorneys for Pennsalt Chemicals Corporation; ALBERT R. CONNELLY, Esquire and JOHN W. BARNUM, Esquire (Cravath, Swaine & Moore), New York City, attorneys for Olin Mathieson Chemical Corporation.

STEEL, J.:

The Government has brought a civil action against Penn-Olin Chemical Company (Penn-Olin), Olin

Mathieson Chemical Corporation (Olin), and Pennsalt Chemicals Corporation (Pennsalt), in which it seeks to prevent and restrain them from allegedly continuing to violate Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18.[1]

The primary attack of the Government is directed against a joint venture between Pennsalt and Olin, pursuant to which they jointly organized and have controlled Penn-Olin for the purpose of having it construct a plant at Calvert City, Kentucky, to produce and sell sodium chlorate. The Government charges that the effect of the joint venture and of the action of the parties thereunder may be to substantially

[1] Section 1 of the Sherman Act provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states * * * is declared to be illegal."

Section 7 of the Clayton Act reads in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

lessen competition and tend to create a monopoly not only in sodium chlorate, but also in other nonchlorate chemicals, in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act. By an amendment to its complaint the Government has also charged that agreements between Pennsalt and Olin entered into in December 1957 and February 1958, denominated, respectively, the "sales agreement" and the "production agreement," restrain trade and commerce in sodium chlorate in violation of Section 1 of the Sherman Act.

JURISDICTION

The Court has jurisdiction over the person of each defendant, and by virtue of Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4, it has jurisdiction over the subject matter of the action.

THE DEFENDANTS

Pennsalt is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. It is a chemical company engaged in the production and sale of about 400 chemicals and chemical products, at 15 plants located in 11 states as follows:

Alabama	Ohio
California	Oregon
Georgia	Pennsylvania (2 plants)
Illinois	Texas (3 plants)
Kentucky (2 plants)	Washington
Michigan	

Pennsalt's nationwide sales operations are conducted from its headquarters in Philadelphia and from 18 regional offices located in 13 states as follows:

Alabama	Ohio (2 offices)
California (3 offices)	Oregon
Georgia	Pennsylvania
Illinois (2 offices)	Texas (2 offices)
Michigan	Washington
Missouri	Wisconsin
New York	

Pennsalt has been engaged in the chemical business for over 110 years. In 1960 its sales amounted to over $90,000,000 on which it earned almost $5,000,000. During the same year, its assets were approximately $90,000,000. Since 1958 it has been engaged in a $55,000,000 capital investment program for the modernization and expansion of existing facilities and the construction of new ones.

Olin is a corporation organized under the laws of Virginia with its principal place of business in New York City. It is a diversified industrial corporation. The Chemical Division is one of seven operating divisions, and accounts for approximately 30% of the corporation's operating revenues. Olin's Chemicals Division produces a great number and variety of chemicals and chemical products from plants located in 15 states as follows:

Alabama	Mississippi
Arizona	Nebraska
Arkansas	New York
Georgia	North Carolina
Illinois	Pennsylvania
Kentucky	Texas
Louisiana	Virginia
Maryland	

Olin was formed in 1954 by the merger of Olin Industries, Inc., and Mathieson Chemical Corporation. Olin's activity in the chemical business reaches back,

through its predecessor, Mathieson Chemical Corporation, to 1892. In 1960 Olin had sales of $690,000,000, on which it earned a net profit of $35,000,000. Its assets during that year amounted to $860,000,000. During 1960 its capital expenditures were almost $49,000,000. Net sales of its chemical division in 1960 amounted to $217,000,000.

Penn-Olin is a Delaware corporation which was organized on February 25, 1960, by Olin and Pennsalt pursuant to a joint venture agreement between them dated February 11, 1960. Pennsalt and Olin each own one-half of Penn-Olin's capital stock. The officers of Penn-Olin are divided equally between officers of Pennsalt and officers of Olin. The board of directors of Penn-Olin is comprised equally of representatives of Pennsalt and those of Olin. Penn-Olin has no officers, directors, or employees who are not concurrently employed by either Pennsalt or Olin. Penn-Olin constructed a plant at Calvert City, Kentucky, at a cost of $6,454,000 for the production of 26,500 tons of sodium chlorate per year. It commenced production on September 1, 1961. By agreements executed in October 1961, dated as of January 2, 1961, Pennsalt undertook to operate the Penn-Olin plant and Olin agreed to sell its output.

All of the defendants are engaged in interstate commerce.

THE ASSERTED ILLEGALITY OF THE JOINT VENTURE

The Government claims that each of the defendants was engaged in interstate commerce at the time when Pennsalt and Olin acquired the stock of Penn-Olin, that the acquisition of such stock was tantamount to an indirect acquisition by Pennsalt and Olin of the assets of the other at a time when each was subject to the jurisdiction of the Federal Trade Commission, and

that the joint venture and the actions taken thereunder may result in a substantial lessening of competition in one or more sections of the country, or tend to create a monopoly, in sodium chlorate and other nonchlorate chemicals. For these reasons it is charged that Section 7 of the Clayton Act has been violated. The Government also charges that regardless of whether the joint venture involved an acquisition of stock or assets banned by Section 7 of the Clayton Act, it nevertheless constituted a combination in restraint of trade in violation of Section 1 of the Sherman Act.

The defendants deny the anticompetitive or monopolistic effect of the joint venture and assert that competition in the manufacture and sale of sodium chlorate has been increased by Penn-Olin entering the field. Defendants also contend that Section 7 of the Clayton Act is without application because, defendants say, Penn-Olin was not engaged in commerce when its stock was acquired by Olin and Pennsalt, and neither Olin nor Pennsalt acquired any interest in the assets of the other when they acquired Penn-Olin stock.[2]

The last defense will not be discussed since, for the reasons hereafter stated, the joint venture did not have the anticompetitive effect at which Section 7 was aimed. The Sherman Act challenge will also be dis-

[2] Defendants also argue that if these contentions are rejected, Penn-Olin must be regarded as a subsidiary of Olin and Pennsalt formed to carry on a lawful extension of their business, within the contemplation of the third paragraph of Sec. 7 of the Clayton Act (the second paragraph of the Act quoted in footnote 1). Hence, it is argued that defendants have violated Section 7 only if the effect of Penn-Olin's organization "is" and not "may be" substantially to lessen competition. It is unnecessary to consider this point in view of the determination that the joint venture probably will not adversely affect competition.

regarded, for the anticompetitive standard imposed by Section 7 of the Clayton Act is less stringent than that of the Sherman Act. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 329 (1962).

Broadly speaking, the Section 7 issues to be resolved are whether the effect of the joint venture:

1. May be to substantially lessen competition or tend to create a monopoly;
2. In any section of the country;
3. In any line of commerce.

These questions will be discussed in inverse order:

THE RELEVANT LINES OF COMMERCE

The parties agree that two "line[s] of commerce" within the meaning of Section 7 of the Clayton Act are relevant to this case: sodium chlorate, and of the nonchlorates, calcium hypochlorite.[3]

Sodium Chlorate

Sodium chlorate is a white crystalline chemical. It is produced commercially by the electrolysis of an acidified solution of salt (sodium chloride). The

[3] The parties have stipulated: Olin and Pennsalt each produce and sell in commerce in the United States the following nonchlorates: ammonia, calcium hypochlorite, caustic soda, chlorine, hydrochloric acid, hydrofluoric acid and sulphuric acid. Competition, if any, in the sale of hydrochloric acid and sulphuric acid is *de minimus*. Olin and Pennsalt compete in the sale of the remaining five chemicals. Of these, calcium hypochlorite has been selected as a "guinea pig" to determine whether the joint venture constitutes a violation of the antitrust laws in the case of nonchlorate chemicals. The presence or absence of substantial competition between Olin and Pennsalt with respect to the production and sale of ammonia, caustic soda, chlorine, and hydrofluoric acid or of the existence of any relevant market for such chemicals, is not relevant to the determination of any issue in the case.

process is closely akin to that used in the commercial production of chlorine and caustic soda. Sodium chlorate of like purity is a fungible commodity. Any which is produced for sale by a domestic producer is reasonably interchangeable with that of any other domestic producer.

In 1960 over 91,000 tons of sodium chlorate, valued at close to $18,000,000, were produced in the United States. The domestic production of sodium chlorate has increased greatly within the last ten years. From 1950–55, the domestic production of sodium chlorate more than doubled, rising from 22,085 tons in 1950 to 46,972 tons in 1955. From 1950–60, the production of sodium chlorate more than quadrupled, rising from 22,085 tons in 1950 to 91,900 tons in 1960.

In 1960, over 54,600 tons of sodium chlorate were produced east of the Rockies and 37,300 tons produced west. At the prevailing prices (9 cents per pound in the east and 10½ cents per pound in the west), eastern production was valued at over $9.8 million while western production amounted to $7.8 million.

The largest consumer of sodium chlorate is the pulp and paper industry. That industry uses sodium chlorate in the bleaching of pulp for brighter, higher quality paper. The pulp and paper manufacturers use sodium chlorate as a principal raw material to generate chlorine dioxide, a gaseous material which possesses the unique ability to bleach cellulose fibers to a maximum whiteness with little or no loss of fiber strength. In 1958 70,541 tons of sodium chlorate were used commercially in the United States. Of this, 29,000 tons, or 41.1%, were used in pulp and paper bleaching. The next largest amount, 16,100 tons, or 22.8%, was used for herbicides (weed control). In 1960, the national shipments amounted to 81,928 tons of which 52,415, or 64%, were for pulp and paper mill

consumption. Of the 47,036 tons shipped into the southeast in 1960, 39,563 tons, or 84%, were consumed by pulp and paper mills.

The recent growth of the sodium chlorate market is largely due to the adoption and rapid expansion of chlorine dioxide bleaching in the pulp industry.

In addition to its use by the pulp and paper industry, sodium chlorate is also used in agricultural chemicals (herbicides and defoliants) and in the production of ammonium perchlorate and other derivatives.

Since 1953 and prior to Penn-Olin, three producing companies, or their predecessors, have constituted the sodium chlorate industry in the United States: Hooker Chemical Corporation (Hooker), American Potash & Chemical Corporation (AmPot), and Pennsalt. Imports of sodium chlorate, stipulated to have been not substantial, have been as follows:

1956	892 tons
1957	335 tons
1958	1,322 tons
1959	2,596 tons
1960	4,152 tons

Hooker is the largest producer and seller of sodium chlorate in the United States. In 1956 Hooker acquired Oldbury Electro Chemical Company (Oldbury) which had produced sodium chlorate at Niagara Falls, New York, since about 1900 and which, in 1954, had constructed a plant in Columbus, Mississippi, to meet the growing demand for sodium chlorate in the southeast. At the time when Oldbury constructed its Columbus plant, it had no other facilities or activities at or near Columbus. The capacity of Hooker's Columbus plant was increased in 1956, 1958, and 1960; the capacity of the Niagara Falls plant was decreased in 1961. The capacity of Hooker's two plants has been as follows:

	Niagara Falls	Columbus
1957	12,000 tons	17,435 tons
1958	12,000 tons	21,340 tons
1959	12,000 tons	29,150 tons
1960	18,000 tons	32,000 tons
1961	14,000 tons	32,000 tons

In 1960 Hooker had assets of $187,000,000 and net sales of $150,000,000.

AmPot is the second largest producer and seller of sodium chlorate in the United States. It entered the business in November 1955 by acquiring Western Electro Chemical Company (Western). The latter had a single plant at Henderson, Nevada, where it had produced sodium chlorate since 1941. In February 1957 AmPot authorized construction of a sodium chlorate plant at Aberdeen, Mississippi, to meet the growing demand in the southeast, and to compete effectively in that market with Hooker's Columbus, Mississippi, plant. AmPot has twice expanded the capacity of the original Aberdeen plant. The capacity of the two AmPot plants has been as follows:

	Henderson	Aberdeen
1957	27,000 tons	----------
1958	27,000 tons	----------
1959	27,000 tons	12,000 tons
1960	27,000 tons	15,000 tons
1961	28,000 tons	22,500 tons

In 1959 the total assets of AmPot were $73,000,000 and its net sales in that year were $50,500,000. AmPot uses the Solvay Process Division of Allied Chemical and Dye Corporation (Allied Chemical) as its sales agent for sales of sodium chlorate to the pulp and paper and textile industries. Allied Chemical is a leading producer and seller of chemicals in the United States. Allied Chemical uses its large sales force and large technical service facilities and the Solvay process for generating chlorine dioxide in selling sodium chlorate produced by AmPot. In 1960 Allied Chemical had assets of $801,000,000 and sales and operating revenues of $766,000,000.

When AmPot's sodium chlorate plant at Aberdeen went on stream, Solvay was almost entirely responsible for selling the output of that plant. Today, the direct selling of the Aberdeen sodium chlorate output is largely AmPot's responsibility. AmPot contributes approximately 70% of the direct selling effort.

The percentages of sodium chlorate sales made by Hooker and AmPot in 1960 were as follows:

	U.S.	East of	Southeast
Hooker	45.9%	54.6%	49.6%
American Potash	35.6%	37.9%	41.7%
Totals	81.5%	92.5%	91.3%

Pennsalt has produced sodium chlorate at Portland, Oregon, since 1941 which it has sold principally west of the Rockies. The following tabulation sets forth its initial productive capacity at Portland and its expansion of that plant to date:

	Tons per year
October 1941	2,194
October 1942	3,448
January 1943	4,248
December 1949	5,448
February 1954	7,848
October 1957	12,392
October 1959	15,392

Until the early 1950's, Pennsalt sales of sodium chlorate were principally for herbicidal use and virtually no sales were made to pulp and paper mills. At that time Solvay, which was selling sodium chlorate produced by AmPot, began offering its chlorine dioxide process to the pulp and paper industry conditioned upon the user purchasing its sodium chlorate requirements exclusively from Solvay. This led Pennsalt, in mid-1953, to enter into an agreement with Mathieson under which Pennsalt was permitted to install the Mathieson process in all the paper mills in the northwest.[4] After this occurred, Solvay was

[4] See footnote 5.

never again successful in putting in its process in the northwest, and by 1960 Pennsalt had attained 100% of the sodium chlorate business of the western pulp and paper industry.

In July 1961 a fourth company, Pittsburgh Plate Glass Company (PPG), announced that it would construct a 15,000 ton per year sodium chlorate plant at Lake Charles, Louisiana. PPG is a large, diversified industrial corporation which produces and sells chemicals through its Chemical Division, formerly a subsidiary company, Columbia Southern. PPG has large technical service, sales, market research, and laboratory forces already serving the southeastern pulp and paper industry. In 1960 PPG had total assets of $625,000,000 and net sales of $628,000,000.

A fifth company, Pacific Engineering & Production Company of Nevada (Pacific), with the aid of a loan of $2,400,000 from American Cyanamid Company, is constructing at Henderson, Nevada, a sodium chlorate plant with a capacity of 5,000 tons per year to commence production late in 1962. For its loan American Cyanamid received a promissory note of Pacific secured by deed of trust on all of Pacific's assets, an option to receive license on Pacific's processes, and an option to acquire all the assets of Pacific or 50% of its common stock. American Cyanamid is a leading producer and seller of chemicals in the United States.

Olin has never manufactured sodium chlorate for sale or been an independent seller of it. For years, however, it and its predecessor Mathieson has manufactured sodium chlorite which was sold to pulp and paper mills. The sodium chlorite, when dissolved in an acid solution by the mills, generated chlorine dioxide which the mills used as a bleaching agent for

the pulp.[5] The raw material used in the manufacture of sodium chlorite is sodium chlorate. In the early 1930's Mathieson produced sodium chlorate chemically for its own use in manufacturing sodium chlorite. During the late 1930's it stopped manufacturing sodium chlorate and turned to buying it. Approximately 5,000 tons of sodium chlorite are sold in the United States annually. Olin is the only domestic producer and 1960 was its best year.

Calcium Hypochlorite

Calcium hypochlorite, like sodium chlorate, is used in the production of pulp and paper. There are three important competitors in calcium hypochlorite: Olin, Pennsalt, and PPG.

In 1959 Pennsalt and Olin together accounted for $6,480,000 sales, or 88.8% of all calcium hypochlorite sold in the United States. Their respective market shares were:

Olin	62.4%
Pennsalt	26.4%

In 1960 Pennsalt and Olin accounted for 76.6% of the $6,900,000 sales of calcium hypochlorite throughout the United States. Ninety-nine percent of each

[5] As a result of research which Mathieson did in chlorine dioxide, it developed the so-called Mathieson process for generating chlorine dioxide to bleach pulp without damaging the fibers. The process was designed to sell sodium chlorite as a new commercial chemical.

While the process of releasing chlorine dioxide from sodium chlorite is relatively easy and inexpensive compared to the generation of chlorine dioxide from sodium chlorate, in large scale production there is a three to one cost advantage in bleaching with chlorine dioxide made from chlorate instead of chlorite. This led Olin to realize that sodium chlorate would soon become the raw material for the process. In the early 1950's therefore Olin began to make its chlorine dioxide generation process available free to pulp and paper industry.

company's sales were made in 43 states where both sold the product.

The competition between Olin and Pennsalt in the sale of calcium hypochlorite is substantial.

THE RELEVANT MARKET

Section 7 of the Clayton Act is aimed at a substantial lessening of competition in "any section of the country," or, as the statute is frequently paraphrased, in any relevant market. Whether a given transaction may substantially lessen competition depends upon its probable effect in a relevant market. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 329 (1961). The delineation of a relevant market is therefore a necessary predicate for determining the anticompetitive effect of any transaction challenged under Section 7. *Brown Shoe Co.* v. *United States, supra,* p. 335.

Calcium Hypochlorite

In calcium hypochlorite the parties agree that the national market is the relevant one.

Sodium Chlorate

The parties likewise agree that there is a relevant southeastern market in sodium chlorate, and although they define this market somewhat differently, the difference is not significant.*

* The Government asserts that the southeastern market includes Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Defendants say that Kansas, Missouri, and West Texas should be excluded. According to the Government, the exclusion of these two and one-half states makes scant difference. Consequently, in the following discussion Kansas and Missouri will be excluded, but the whole of Texas will be included. No evidence warrants splitting Texas and much of the evidence bearing upon competition treats it as an entity.

But here agreement ends. The Government claims that there are two other relevant markets: the national market and the eastern market.

The national market, as the name implies, embraces the entire continental United States, except Alaska. The finding of a national market is important in the Government's view because it is said to put Pennsalt, Olin, and Penn-Olin in the same area, to establish that Pennsalt and Olin should have been actual competitors, as a matter of law, at the time of Penn-Olin's creation, and to determine that Pennsalt and Penn-Olin were actual competitors, as a matter of law, following Penn-Olin's creation. Defendants deny that a national market exists.

The eastern market is defined as the entire United States east of the Continental Divide. It excluded only the states lying west of the Rocky Mountains, viz, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Defendants say that the statistical analysis of the competitive effect of Penn-Olin is the same regardless of whether the eastern or southeastern market is deemed to be relevant, and that it is immaterial whether there is a relevant eastern market. This position, asserted both in defendants' brief and at the argument, was not controverted by the Government. It has made no effort to show a difference, significant in antitrust law, between the competition effect of the challenged transactions in the so-called eastern as against the southeastern market. The Court does not therefore feel called upon to make an independant analysis of the problem. So the issue is the narrow one whether the southeast is the only relevant market, or whether there is a relevant nationwide market as well.

A market is relevant in determining whether a given transaction may substantially lessen competition only if it is an area of effective competition. *Standard Oil Co.* v. *United States*, 337 U.S. 293, 300 n. 5 (1949); *United States* v. *Maryland Virginia Milk Producers Ass'n.*, 167 F. Supp. 799, 802 (D.D.C. 1958), aff'd 362 U.S. 458 (1960). The two terms—area of effective competition and relevant market—are synonymous. *Tampa Electric Co.* v. *Nashville Coal Co., supra*, p. 328.

Whether a geographic location is or is not an area of effective competition in a given case is a question of fact. Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal legalistic one. The geographic market in which the anticompetitive effect of a transaction is to be tested must both correspond to the commercial realities of the industry and be economically significant. *Brown Shoe Co.* v. *United States, supra*, pp. 336-337 (1962). It can be defined only in the light of the overall objectives of Section 7 and with particular recognition that it is being defined for the purpose of determining the reasonable probability of substantially lessening competition. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 588 (S.D.N.Y. 1958).

When Pennsalt and Olin entered into the joint venture, there were only three companies in the United States which produced sodium chlorate for sale commercially: Hooker, AmPot, and Pennsalt. Pennsalt had only one plant. It was on the west coast at Portland, Oregon. Hooker had two plants, both in the east. One was at Niagara Falls, New York, and the other at Columbus, Mississippi. AmPot had two plants—one in the east at Aberdeen, Mississippi, and the other in the west at Henderson, Nevada. The

Mississippi installations of AmPot and Hooker were both in the southeastern market.

The southeastern market was the one in which there was the heaviest concentration of sodium chlorate buyers.[7] Of the buyers, the pulp and paper mills were far and away the largest.[8] Plants having almost half of the national sodium chlorate productive capacity were also located in the southeast.[9]

After the southeast, the largest concentration of buyers and the largest productive capacity were in the 11 states west of the Rocky Mountains.[10]

In 1960, therefore, the two most important markets in the United States, both from the standpoint of consumption and production, were first, the southeastern market, and second, the western market. Of foremost importance in determining whether there was a nationwide relevant market is the question whether western shippers could compete effectively in the

[7] Out of 82,094.70 tons shipped in 1960 within the United States, 47,035.76, or 57.3%, went to the southeastern market. Of the remainder, 18,152.72 tons, or 22.2%, were shipped west of the Rockies, and the balance of 16,906.22, or 20.5%, went elsewhere.

[8] In 1960, of the 47,035.76 tons of sodium chlorate shipped to southeastern buyers, 39,562.83 tons, or 84.1%, were purchased by the pulp and paper industry. The amount so purchased represented 75.5% of the 52,415.03 tons purchased by all of the pulp and paper mills in the United States.

[9] As against the 1960 national productive capacity of 107,434 tons, plants having a tonnage capacity of 47,000 tons were in the southeast, viz, Hooker at Columbus, Mississippi, with 32,000 tons, and AmPot at Aberdeen, Mississippi, with 15,000 tons. The capacity of the latter was increased to 22,500 in December 1960.

[10] See footnote 7 as to buyer concentration. The productive capacity of the Pennsalt plant at Portland was 15,434 tons and that of AmPot at Henderson was 27,000 tons, making a total of 42,434 tons, as against the total national productive capacity of 107,434 tons.

southeast, and southeastern producers could compete effectively in the 11 western states. Unless they could, there was no relevant national market.

Normally of vital importance to competitive effectiveness are quality, price, and service. So far as appears, neither AmPot, Hooker, or Pennsalt enjoyed any advantage over the other in the quality of its product. From the standpoint of both price and service, Pennsalt was at a decided disadvantage, as against AmPot and Hooker, in supplying buyers in the southeast.

Pennsalt's price disadvantage resulted from the cost of transportation which it had to bear. To be competitive in the southeast, Pennsalt was faced with the necessity of absorbing the difference between the freight from its Portland plant and the buyer, and the freight between the buyer and the closest southeastern supplier. The freight disadvantage to AmPot in shipping a ton of sodium chlorate into the southeastern market from Henderson, Nevada, as against shipping it from Aberdeen, Mississippi, was approximately $25 to $30 a ton. This represented about 15% of the delivered price of $163 a ton. The freight disadvantage to Pennsalt was even greater.

A competitive price disadvantage arising from transportation costs is an important factor in determining the scope of a relevant market. *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), reh. den. 334 U.S. 862 (1948); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957), aff'd 259 F. 2d 524 (2d Cir. 1958); *Erie Sand & Gravel Co.* v. *F.T.C.*, 291 F. 2d 279, 281–282 (3d Cir. 1961). The record fails to suggest that Pennsalt was in a position to surmount or equalize its freight disadvantage because of lower operational costs, or otherwise.

Remoteness from southeastern buyers also placed Pennsalt at a service disadvantage. To pulp and paper manufacturers prompt delivery is a matter of importance. Delivery time for a shipment from Mississippi to the southeastern market is normally two to four days. Shipments from the northwest take ten to fourteen days. The chances of shipping delays increase as the distance between supplier and customer becomes greater. When Olin was acting as selling agent for Pennsalt under the December 1957 contract, Olin encountered buyer resistance because Pennsalt's production was located at a substantial distance from the market.

In addition, a buyer wants an assured source of supply. A remote seller such as Pennsalt who is called upon to absorb substantial freight costs cannot be viewed as a stable source of supply. It will, in all likelihood, favor buyers in its own vicinity whenever the supply situation becomes tight. This would appear to be particularly true in the case of Pennsalt since for many years both the bulk price and the drum price of sodium chlorate has been higher west of the Rockies than east of the Rockies. This price differential of about 15%, coupled with the freight equalization with which Pennsalt is burdened, would, in times of short supply, naturally cause Pennsalt to favor west coast purchasers at the expense of buyers in the southeast. The proximity of productive facilities in terms of the availability to a buyer of service and supply is also important in the delineation of a relevant market. *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F. 2d 800, 817 (9th Cir. 1961), cert. den. 370 U.S. 937 (1962). See also *Tampa Electric Co.* v. *Nashville Coal Co., supra,* pp. 331–333.

The disadvantages inherent in the distance of Pennsalt's plant from southeastern buyers prevented

Pennsalt from effectively competing against suppliers with plants in that area. To Pennsalt, the southeast was not a "natural locus of distribution." *American Crystal Sugar Co.* v. *Cuban-American Sugar Co., supra,* p. 398. Pennsalt's proximity to pulp and paper manufacturers in the northwest made that market the natural distributional area for it. In 1960 Pennsalt supplied 100% of the sodium chlorate bought by pulp and paper manufacturers in the northwest.

The Government answers that Pennsalt's competitive handicaps are theoretical only. It argues that despite Pennsalt's natural, freight, or other burdens, it has hurdled all obstacles, and by its actual shipments across country has demonstrated its ability to effectively compete in the southeast. Theory, the Government says, is of little consequence as against the facts. *United States* v. *Bethlehem Steel Corp., supra,* pp. 592, 599.

The Government points out that in 1960 Pennsalt shipped across country 4,877 tons of sodium chlorate, or 32% of its total shipments of 15,362 tons. The key factor which enabled Pennsalt to do this is said to have been the substantial excess of eastern demand over production.

Despite the Government's assertion of a substantial imbalance between supply and demand in the "eastern" market, none existed in the southeast. The total shipments of sodium chlorate to the southeast during 1960 was 47,035.76 tons. The total capacity of the southeastern plants was 47,000 tons: Hooker at Columbus, 32,000 tons; AmPot at Aberdeen, 15,000 tons. In 1960 the southeastern market was not a deficit area.[11]

[11] The supply situation was to be further improved in December 1960 when AmPot's capacity at Aberdeen was increased by 7,500 tons. This brought the total capacity of AmPot and Hooker in Mississippi up to 54,500 tons.

In 1960 Pennsalt shipped into the southeastern market 4,186 tons, or 27% of its total shipments of 15,195 tons. Of these shipments, 3,203 tons were sold by Olin as agent for Pennsalt under their sales contract of December 1957.[12] Olin had long-standing contacts with many buyers as a result of other chemicals sold to them and enjoyed a unique good will because of having made the Mathieson process available without charge. The arrangement between Pennsalt and Olin was only temporary, and Pennsalt was losing $80,000 a year on the sales which Olin was making. Pennsalt's shipments of 3,203 tons in fulfillment of sales generated by Olin were of a special nonrecurring kind. They cannot be considered as indicative of Pennsalt's effectiveness as an independent competitor in the southeast.

Apart from the 3,203 tons sold by Olin, Pennsalt shipped only 983 tons of sodium chlorate into the southeastern market.[13] The total shipments of sodium chlorate into the southeastern market in 1960 for all purposes was 47,035.76 tons. Of this, Hooker shipped 23,263.52 tons, or 49%, and AmPot shipped 19,586.24 tons, or 42%. Pennsalt's shipments of 3,203 tons under the sales agreement with Olin were 7%. The shipments which Pennsalt made in satisfaction of its own sales were 2%.

---

[12] This is discussed in detail at p. 60 et seq. of this opinion.

[13] Of this amount, 363.5 tons went to Buckeye Cellulose Company, a subsidiary of Procter & Gamble. Since Buckeye owned its own freight cars which were used to transport the sodium chlorate from Portland to Florida, the railroad made an allowance to Buckeye covering the cost of returning the cars to the point of origin. This circumstance, which gave Buckeye a unique advantage in receiving shipments from the west coast, coupled with the fact that Procter & Gamble was an important customer for other products of Pennsalt, are the reasons why Pennsalt had the Buckeye account.

706-441—63——4

Furthermore, of the 983 tons shipped to the southeast by Pennsalt, independently of Olin, only 458.40 tons went to pulp and paper manufacturers.[14] This was 1% of the total tonnage of 39,562.83 which was shipped to the southeastern pulp and paper manufacturers in 1960. It compares with 18,127.71 tons, or 46%, shipped by Hooker, 17,556.72 tons, or 44%, shipped by AmPot, and 3,420 tons, or 9% sold by Olin for Pennsalt.

In 1960 shipments of 7,472.93 tons of sodium chlorate were made to buyers, other than pulp and paper mills, in the southeast. The sales agreement which Pennsalt had with Olin left Pennsalt free to compete for this business. It succeeded in obtaining 525 tons, or about 7%.

Both in theory and in fact Pennsalt was not an effective competitor in the southeast.

In furtherance of its national market claim, the Government points out that in 1960 AmPot shipped across country 8,808 tons of sodium chlorate from its Henderson, Nevada, plant, or 64% of its total shipments of 13,767.82 tons from that plant. Of these "across country" shipments, 7,237 tons, or 52.6%, of the shipments from Henderson went into the southeast. But at the time AmPot's Aberdeen plant, with a productive capacity of 15,000 tons, was unable to take care of the total tonnage of 19,586.24 tons which AmPot supplied to southeastern buyers. In contrast, AmPot's Henderson capacity of 27,000 tons far exceeded the 9,586.55 tons demanded by AmPot's customers in areas outside the southeast. This dual imbalance between supply and demand at AmPot's two plants was intracorporate and temporary. It was

[14] This is 94.9 tons more than the 363.5 tons that went to Buckeye, the Pennsalt reserved account. It represents shipments to two other southeastern pulp and paper mills.

rectified in December 1960 when AmPot increased its capacity at Aberdeen by 7,500 tons. It was AmPot's intention to satisfy the requirements of its customers in the southeast out of this increased capacity at Aberdeen and not from Henderson.[15] So that such shipments as AmPot made into the southeast from Henderson are not significant in determining whether a western shipper can effectively compete for business in the southeast.

So far as shipments from the southeast to the west are concerned, in 1960 AmPot made no shipment from its Aberdeen plant to buyers west of the Rockies.

Hooker's situation with respect to east-west shipments was different. Although in 1960 Hooker made no shipments to the west coast from its Niagara Falls plant, it shipped 2,708.35 tons from its Columbus plant to customers west of the Rockies. This was 14.9% of the 18,152.72 tons shipped into the area. It compares with 10,485 tons, or 57.8% shipped by Pennsalt from Portland and 4,959.37 tons, or 27.3% shipped by AmPot from Henderson. The 2,708.35 tons which Hooker shipped to buyers in the west represented 7% of the 37,559.91 tons which Hooker shipped from both Niagara Falls and Columbus.

At the time Hooker had excess productive capacity of magnitude. As against a total of 50,000 tons (Niagara Falls 18,000 tons, Columbus 32,000 tons) it shipped to all markets east of the Rockies only 34,851.6 tons, or 70% of its available capacity. Tonnage shipped from the Columbus plant to all markets east of the Rockies amounted to 26,478.23 tons leaving that plant with 5,521.77 tons at Columbus, or 20.9% of the

[15] It could hardly be expected to do otherwise since the freight disadvantage in shipping from Henderson to the southeast, as against shipping from Aberdeen, was $25 to $30 a ton, or something in excess of 15% of the bulk sales price of $163 in the southeastern market.

plant capacity, to be disposed of. It was out of this excess that the 2,708.35 tons were supplied to the west. Of this, 1,920.65 tons, or about two-thirds, went to a single buyer, U.S. Borax Co., for herbicidal use.

The total shipments of AmPot and Hooker from their eastern facilities were 52,964.88 tons; viz:

Hooker shipments—Columbus and Niagara Falls	37,559.91
AmPot shipments—Aberdeen	15,404.97
Total	52,964.88

Of this, the 2,708 tons which Hooker shipped to the west coast from its excess capacity at its Columbus plant, amounted to 5%. The east-west shipments by Hooker in 1960 were undoubtedly the result of a desire to keep its plants operating as close to capacity as possible when eastern buyers were not available.

Here, there is no indication that an imbalance between supply and demand, either nationally or locally, had been the industry norm over a period of years or that it will be in the future. This circumstance makes irrelevant *United States* v. *Bethlehem Steel Company, supra,* which held that in determining the relevance of a market, freight costs were only a marginal factor when an industry-wide imbalance between supply and demand had persisted through the years and reflected an industry pattern (pp. 598–599).

In sum, neither Pennsalt nor AmPot could compete effectively from their western plants for business in the southeast where the highest concentration of buyers was located. Nor could AmPot or Hooker, the two companies having eastern facilities, effectively compete for business on the west coast. In each case the competitive limitation was due to market remoteness. There was no national market for sodium chlorate in 1960 relevant to an ascertainment of the competitive impact of the joint venture.

THE EFFECT OF THE JOINT VENTURE ON COMPETITION IN SODIUM CHLORATE

On the competition issue, the initial position of the Government is novel and far reaching. It contends that Pennsalt and Olin *could* have competed with each other since each was as financially able and otherwise competent to compete on an individual basis as other sodium manufacturers which were doing so. In these circumstances, it is said that the antitrust laws required Pennsalt and Olin to compete individually or to stay out of business.[16] Their attempt to compete jointly, through the medium of Penn-Olin, because of a desire for greater profitability and risk limitation, is therefore said to be violative of Section 7.

The Government thus lays aside as immaterial any consideration of whether, but for Penn-Olin, Pennsalt and Olin *would* have entered the market as individual competitors, or what the competitive affect of Penn-Olin may be in the light of relevant economic factors. Instead, it would substitute a conclusive presumption that *any* combination specified in Section 7 between companies having the overall capability to go into business alone has a pernicious effect on competition

[16] The Post Trial Brief of the Government states (p. 1):

"This case involves a joint venture between two companies that could have competed."

The same brief states at p. 2:

"The fundamental issue posed by the trial of this case is whether the anti-trust laws condemn the entry of competitors into business together when, except for subjective preferences based on profitability and risk, each could have done so alone."

The Government's reply brief states (p. 30):

"When competitors and potential competitors have comparable resources and face similar hurdles, the anti-trust laws require that they meet these challenges on individual terms or not at all. They may compete or not as they please. But the option to compete or combine is forbidden."

and lacks any redeeming virtue; it would make *any* such combination illegal *per se*. No precedent supports the Government's position and its lack of logic condemns it. Compare *United States* v. *E. I. DuPont de Nemours & Co.*, 118 F. Supp. 41, 219–220 (D. Del. 1953), aff'd 351 U.S. 377 (1956) which held that under the Sherman Act it is not illegal *per se* for actual competitors to combine by means of a joint venture, but that a determination of the unreasonableness of the restraint is essential to its illegality.

The real issue is whether, based upon relevant economic factors, the formation of Penn-Olin has resulted, or as a reasonable probability will result, in a substantial lessening of competition or tend to create a monopoly in sodium chlorate in the southeastern part of the United States.

Prior to the joint venture, Olin had never produced sodium chlorate for sale in any market area or during any period of time. Nor had it ever sold sodium chlorate except for the limited time when it acted as sales agent for Pennsalt under the December 1957 contract. It had never purchased for its own use sodium chlorate from Pennsalt. On the other hand, Pennsalt had been manufacturing and selling sodium chlorate since 1941 from its plant at Portland, Oregon. Its shipments into the southeastern market were competitively not substantial.

The creation of Penn-Olin did not represent a combination of companies which were competing in the manufacture and sale of sodium chlorate in the southeastern market or elsewhere. Nor did it represent a combination of companies standing in the relationship of supplier and customer in the southeastern market or elsewhere.[17] It was neither a vertical combination

[17] Olin purchased sodium chlorate to use as a raw material in manufacturing sodium chlorite at its Niagara Falls plant. This sodium chlorate was purchased from Hooker's neighboring

or a horizontal combination.[18] Contrasted with these anticompetitive relationships which are frequently the subject of antitrust condemnation, the arrangement between Olin and Pennsalt was *sui generis*.

When Section 7 was amended in 1950 Congress was apprehensive of the rising tide of economic concentration as a dynamic force which it believed posed serious threats to the free enterprise system. One of the basic purposes of the 1950 amendment was to arrest in their incipiency combinations resulting in the concentration of power which would probably have the effect of jeopardizing to a substantial extent competition. *Brown Shoe Co.* v. *United States, supra,* pp. 315, 317.

The creation of Penn-Olin was not the typical case of one competitor menacing an industry by increasing its competitive power through the acquisition of another competitor. Penn-Olin was not the instrumentality through which two competitors sought to enlarge their economic power. Pennsalt and Olin were not competitors. Pennsalt was a company which had experience in the manufacture and sale of sodium chlorate in the far west. Olin was a company which had contacts of value with prospective customers in the southeast. Penn-Olin was the means by which the strength of the two companies was joined—not for the purpose of further pre-empting a market which they already occupied, but to break into a market to chal-

---

Niagara Falls plant. Pennsalt from its Portland plant could not have competed successfully with Hooker for Olin's business.

[18] When the arrangement is between companies standing in a supplier-customer relationship it is characterized as vertical; when between companies performing similar functions in the production or sale of comparable goods or services, it is said to be horizontal. *Brown Shoe Co.* v. *United States, supra,* pp. 323, 334.

lenge the supremacy of two companies which were dominating it.

Those companies were Hooker and AmPot. In 1960 Hooker supplied 49.5% and AmPot furnished 41.6% of the requirements of buyers in the southeast. Pennsalt's share, independent of the quantity sold by Olin as its sales agent, was 2.1%, and including Olin's sales, was 8.9%.

As for productive capacity, Pennsalt nationally was the smallest of the three companies. In 1960, Hooker had 50,000 tons, or 46.5%, AmPot 42,000 tons, or 39.1%, and Pennsalt 15,434 tons, or 14.4%. In the southeastern market, Hooker's plant at Columbus, Mississippi, had a capacity of 32,000 tons, or 68%, of the total capacity in that market, and AmPot's 15,000-ton plant at Aberdeen possessed the remainding 32%. Pennsalt had no plant in the southeast.

When Penn-Olin goes on stream it can reasonably be expected to have an immediate effect on competitive conditions which theretofore existed. Thereafter, it is not to be supposed that Pennsalt will continue to make shipments to the southeast. What it otherwise might have supplied from Portland will be shipped by Penn-Olin from Calvert City. As an independent competitor in the southeast, Pennsalt will probably be finished. But the elimination of Pennsalt does not mean that competition will be substantially lessened within the intendment of Congress. Whether a combination described in Section 7 will have the anti-competitive effect forbidden by the Act, cannot be ascertained merely by looking at its effect upon the competitive activities of the combining companies. The critical determination is whether the combination substantially lessens competition *generally* in an economically significant market. *Brown Shoe Co.* v.

United States, supra, p. 335. Pennsalt occupied only a relatively insignificant competitive position in the southeast. As will be later shown, the competitive benefits which derive from Penn-Olin entering the market far exceed any competitive loss resulting from Pennsalt's probable elimination.

The Government asserts that another immediate effect of the joint venture will be to make Olin a captive buyer of sodium chlorate from Penn-Olin and to deprive other suppliers of obtaining any of Olin's business. For some years Olin has been buying sodium chlorate at its Niagara Falls plant to use in the manufacture of sodium chlorate. Its requirements have been supplied by Hooker from its Niagara Falls plan.[19] While Olin's 50% ownership of Penn-Olin does not legally deprive Olin of the right to continue to buy from Hooker or anyone else, self-interest might lead Olin to buy from Penn-Olin. But it cannot be said that as a matter of reasonable probability Olin will do so. Whether purchasing from Penn-Olin will be to Olin's *net* advantage depends upon a balancing of the advantage which will accrue to Olin as a stockholder of Penn-Olin as against freight and service disadvantages inherent in shipments from Calvert City instead of a "next door" supplier. The record gives no indication how Olin will evaluate these conflicting considerations. In any event, however disadvantaged

[19] Hooker's shipments to Olin have been as follows:

Year	Tons
1957	1,300
1958	1,100
1959	1,300
1960	1,350
1961 (6 mos.)	560

Larger quantities of sodium chlorate sold in the United States, but produced outside of the United States, from 1958 to 1960, have been stipulated not to be substantial.

other suppliers may be in seeking Olin's business, it will not diminish competition for business in the southeast.

The primary attack of the Government is not directed to the alleged adverse affect of the joint venture on existing competition, but against its affect upon various aspects of potential competition.

The Government argues that the financial resources of defendants, as compared with those of Hooker and AmPot, are so great as to give Penn-Olin competitive advantages that will ultimately lead to market domination by it. This contention is based largely upon the proposition that the defendants, because of their size, will be able to use their combined buying power as a basis for making reciprocal arrangements with vendors who are sodium chlorate buyers, which will give Penn-Olin an undue sales advantage over its competitors.

Pennsalt is an acknowledged practitioner of reciprocity and uses purchasing-marketing coordination to further its sales efforts. Whether this is also the policy of Olin is more questionable. The record does not disclose whether Hooker and AmPot have or will endeavor to capitalize on their buying power to further their sales position. But in any event, whatever advantage Penn-Olin might be able to obtain through reciprocal arrangements because of the combined size of the defendants scarcely warrants the conclusion that as a matter of reasonable probability Penn-Olin will ultimately dominate the sodium chlorate market.

AmPot and Hooker are both multi-million dollar companies with established positions in the southeastern market. Neither is apt to be at a competitive disadvantage simply because of defendants' size. Thus far, neither has shown any disposition to lessen its competitive efforts because of confrontation by

Penn-Olin. On the contrary, both have attempted to make themselves more formidable as business rivals. Prior to Penn-Olin, the capacity of the Hooker plant at Columbus was 29,150 tons. Since Penn-Olin, the capacity has been increased to 32,000 tons. After Penn-Olin's plan to build a plant at Calvert City became known, Hooker employed a new salesman who was a specialist in pulp and paper sales, and installed a pulp and paper research laboratory for its customers. It offered its customers five-year contracts guaranteeing them a firm price during the contract period. It also proposed to increase its selling efforts generally. These actions were due in part at least to the increased competition expected from Penn-Olin.

Similarly with AmPot. After AmPot learned of the joint venture it proceeded to expand the capacity of its Aberdeen plant from 12,000 to 22,500 tons, and began to offer five-year contracts to its customers guaranteeing them a fixed price for five years.

The determination in 1961 of PPG to enter the southeastern market makes the likelihood of market domination by Penn-Olin even more remote. PPG plans to construct a sodium chlorate plant at Lake Charles, Louisiana, with an intended ultimate capacity of 15,000 tons. It is a company which in 1960 had assets of $625,000,000 and sales of $628,000,000. From the standpoint of size it is capable of competing effectively with Penn-Olin or anyone else. The Government's forecast that Penn-Olin will uproot Hooker and AmPot from their entrenched positions and ultimately become the dominant factor in the southeast is based on conjecture and nothing more.

The Government further asserts that the size of the Calvert City plant will probably deter other companies from entering the southeastern market, when otherwise they might have done so. The Government

points out that Penn-Olin's 26,500-ton plant was the largest ever built at one time in the United States, and that previously almost all plants at the outset went in the 2,000–15,000 range. By the time Penn-Olin was ready to build, the demand for sodium chlorate in the southeast had increased dramatically. The size of its plant was not out of line with competitors' plants then in existence or imminently in prospect. The *in terrorem* significance which the Government attributes to the disparity between the size of Penn-Olin's plant and those initially constructed by others under conditions which then prevailed, is not warranted.

Such evidence as there is should allay any fear that Penn-Olin, either because of the size of its plant or the combined resources of the defendants, will have any exclusionary effect upon potential entrants having antitrust relevance. When PPG announced its decision to build at Lake Charles, Louisiana, it knew of Penn-Olin's intention to build at Calvert City. Prospective competition from Penn-Olin did not cause PPG to alter its plans. It is true that PPG made its decision after the present suit was begun. It cannot be supposed, however, that PPG's decision was made upon the basis of so hazardous a judgment that Penn-Olin would be eliminated or rendered substantially less effective competitively by a judgment in the Government's favor. It is more reasonable to conclude that PPG acted because an appraisal of market conditions convinced it that regardless of the outcome of the present litigation, additional sodium chlorate capacity was needed in the southeast and that after its plant was built, it would be able to obtain a fair share of the market for itself.

The Government points out that "rumor" indicated that the idea of building in the southeast occurred

to the Solvay Division of Allied Chemical Corporation, Wyandotte Chemicals, and Virginia Smelting Company, but that none had done so. Penn-Olin is said to be the reason. This rumor was never substantiated. Each of the rumored potential competitors was interviewed by agents of the F.B.I. at the direction and under the supervision of counsel for the Government. Yet the Government called no witness from any of the companies. Its failure to do so at least suggests that it could find no one to corroborate its claim.

It is true that prior to the joint venture Pennsalt was of the opinion that the southeastern market could handle only one more significant producer; and both Pennsalt and Olin believed that by a prompt announcement on February 15, 1960, of the formation of Penn-Olin and its plans, the market might be preempted from other potential competitors.[20] But this evidence will not support the conclusion that one or more other companies were probably deterred by Penn-Olin from going into business in the southeast, since there is no proof that any newcomer other than PPG was considering doing so and PPG decided to enter the market after Penn-Olin had been announced. The absence of entry by others, in itself, is not too meaningful, since even before the formation of Penn-Olin was announced there have been no newcomers in the sodium chlorate industry for a decade. Furthermore, whether the unidentified companies which the Government asserts were probably excluded from the market would have been as effective business rivals as Penn-Olin is to be doubted. The combined experience

[20] Evidence of the intention of parties to a combination is an aid in predicting their probable future conduct and the probable effect of the combination. See *Brown Shoe Co.* v. *United States*, *supra*, p. 329, n. 48.

of Pennsalt and Olin in sodium chlorate far exceeded that of any other potential market entrant. AmPot and Hooker had a virtual monopoly in the southeast and a formidable opponent was required if substantial inroads upon their entrenched positions were to be made.

It cannot be held that as of the date of trial Penn-Olin probably deterred others from entering the field. What Penn-Olin's effect in the future may be upon would-be entrants can only be a matter of conjecture. Obviously, the number and strength of companies already in a market will have a bearing upon another's decision to enter it. But it is only one of a myriad of other factors which will control the decision. The imponderables are too great to hazard a forecast as to Penn-Olin's future deterrent affect, even on the basis of probabilities, which will have validity.

The Government makes the further argument that if Olin and Pennsalt had not determined to become partners via Penn-Olin, the probabilities are that both would have built a sodium chlorate plant somewhere in the southeast. Penn-Olin, the argument runs, thus prevented Pennsalt, an "actual" competitor, and Olin, a "potential" competitor, from independently competing in the southeast.[21]

The interest which Pennsalt had in building a sodium chlorate plant in the southeast was of long

[21] An additional argument is that the practical effect of Penn-Olin was to bring about an allocation of markets between Olin and Pennsalt. Thus, it is said that the joint interest of the companies in Penn-Olin will necessarily prevent Pennsalt from competing from its Portland plant for business in the southeast, and has foreclosed Olin from competing for west coast business from the plant which, but for Penn-Olin, it would have built in the southeast. This argument assumes a national market of competitive effectiveness. The absence of such a market invalidates the argument.

standing. Its 20-year operating experience at Portland had provided it with all requisite manufacturing know-how, and it was aware of the rapidly expanding market in the southeast. As early as 1951 it had cost studies made for a plant at Calvert City, Kentucky. From 1955 on the company gave almost continuous consideration to the establishment of a plant in the southeast. The record contains frequent expressions of optimism by Pennsalt personnel concerning the desirability of southeastern expansion. Yet no decision to proceed was ever arrived at. This was due primarily to the inability of the management to satisfy itself that the plant would be sufficiently profitable to meet the rate of return standard which it had established as a condition for new investments.

Olin's interest in manufacturing and selling sodium chlorate in the southeast for its own account likewise antedated the joint venture by a number of years. It realized that sodium chlorate would soon replace sodium chlorite as a raw material in the Mathieson process, and that the demand for sodium chlorate by pulp and paper mills in the southeast was rapidly expanding. It had extended experience in the technical aspects of bleaching pulp and paper. It possessed valuable contacts with the pulp and paper mills as a result of selling other chemicals to them, and having made available, without charge, the Mathieson process. This combination of circumstances led Olin to actively consider the possibility of building a plant of its own in the southeast. To that end, it had studies made of plant location, power availability, sales potential, manufacturing techniques, construction costs, profitability, and other relevant factors. But Olin, like Pennsalt, never decided to go forward independently with the project. The primary difficulty encountered every time the project was analyzed

seemed to be the generally unsatisfactory rate of return.

Paralleling in point of time the studies which Pennsalt and Olin were making concerning the feasibility of building their own plants where several years of sporadic discussions between them relating to the possibility of entering the southeastern market by means of a joint arrangement of some kind. The joint venture agreement was the culmination of these discussions. The possibility of individual entry into the southeastern market had not been completely rejected by either Pennsalt or Olin before they decided upon the joint venture.[22]

---

[22] Osborne, the President of Penn-Olin, testified that Olin's decision to enter the joint venture was made without determining that Olin could not or would not be an independent competitor. He testified that that question "never reached the point of final decision."

Pennsalt asserts that on December 5, 1957, its management made its final decision that it should not build a plant of its own and that this decision was never reconsidered or changed. The view that the December 5, 1957, decision was final is rejected. The record is replete with evidence that after December 5, 1957, Pennsalt continued to manifest an interest in an independent sodium chlorate venture, although this was primarily in the posture of a combined sodium chlorate-ammonium perchlorate plant. The consideration which was given to the ammonium perchlorate aspect of the venture was basically to support the manufacture of sodium chlorate. Ammonium perchlorate was viewed as a "sweetener" to justify the investment economically, since ammonium perchlorate, as compared with sodium chlorate, yielded a relatively high rate of return on investment.

In December 1958 the management of Pennsalt agreed to launch a full-scale effort to determine the feasibility of a sodium chlorate-ammonium perchlorate plant. This effort was not made because in January 1959 Pennsalt resumed joint venture discussions with Olin. The January 1959 minutes of the Appropriation Committee of Pennsalt indicate that if Olin was not desirous of proceeding with the joint venture, data on

At the time when the joint venture was agreed upon Pennsalt and Olin each had an extensive background in sodium chlorate. Pennsalt had years of experience in manufacturing and selling it. Although Olin had never been a commercial manufacturer, it possessed a substantially developed manufacturing technique of its own, and also had available to it a process developed by Vickers-Krebs with whom it had been negotiating to construct a plant. Olin had contacts among the southeastern pulp and paper mills which Pennsalt lacked, but Pennsalt's own estimates indicate that in a reasonable time it would develop adequate business to support a plant if it decided to build. A suitable location for a plant was available to each company—Calvert City, Kentucky, for Pennsalt, and the TVA area around Chattanooga, Tennessee, for Olin. The financing required would not have been a problem for either company. In short, when the joint venture agreement was signed, Pennsalt and Olin each possessed the resources and general capability needed to build its own plant in the southeast and to compete with Hooker and AmPot in that market. Each could have done so if if had wished. While neither company was able to satisfy itself with the rate of return potential of an individually owned plant, the forecasts of each company indicated that a plant could be operated with profit.[23] From the

doing the project alone should be resubmitted to the committee. As late as December 30, 1959, Land, General Manager, Industrial Chemicals Division East, was still of the view that no final decision had been made whether Pennsalt would build its own plant.

[23] For instance, the so-called Whither Report of the Chemical Division of Olin dated April 10, 1959, disclosed that if Olin built a 15,000-ton sodium chlorate plant at Mackintosh, Alabama, it could be expected to show a profit after taxes equal to 11% on the gross investment of $4,100,000. A revision of the

standpoint of profitability, however, Pennsalt and Olin both believed that they could make more money on their investment and that the risks would be less if their business were carried on through a jointly owned plant rather than by means of plants individually owned.

The fact that Olin and Pennsalt each had the capability of building a plant and competing individually is of no controlling significance. It is important only as a factor in determining whether as a matter of probability *both* companies would have entered the market as individual competitors if Penn-Olin had not been formed.[24] Only in this event would potential competition between the two companies have been foreclosed by the joint venture. Whether or not as a matter of probability Pennsalt or Olin would have constructed a plant of its own in the absence of Penn-Olin, need not be decided, for the reasons hereinafter stated.

No evidence exists which will support a finding that if Penn-Olin had not been created Pennsalt and

---

Report in October 1959 revealed that if Olin constructed a combined sodium chlorate-chlorine-caustic plant at Chattanooga, Tennessee, the investment of $3,590,000 attributed to the 15,000-ton sodium chlorate facility would yield an after-tax profit of 13.1%.

A study made by Pennsalt in 1959 for a combined sodium chlorate-ammonium perchlorate plant at Calvert City, Kentucky showed that the $6,961,300 investment cost assigned to the 25,000-ton sodium chlorate phase would yield a 15.9% after-tax return.

Although both companies made a number of studies of the potential profit to be derived from a sodium chlorate plant and the anticipated yield on investment was not uniform, each of the studies forecast a profit.

[24] Section 7 is not concerned with possibilities of competition being substantially lessened; its aim is directed against combinations that probably will have that result. *Brown Shoe Co. v. United States*, *supra*, p. 323.

Olin would have *simultaneously* determined to build their own plants. Not only the inherent improbability of this occurring, but the protracted study which each company gave to the problem without arriving at an affirmative decision, negates such a likelihood. So that the best possible postulate on which the Government's case can be based is that one company would have decided to build while the other continued to ponder.

The decision by one company to build, however, might have had a bearing upon the decision of the other. The considerations which might induce one company to build its own plant when Hooker and AmPot were the only competitiors would not necessarily be the same if a third competitor were about to enter the market. Pennsalt and Olin were each hesitant to build a plant of its own in a market occupied by two competitors. Whether the imminent presence of a third competitor might have made the prospect more or less appealing cannot be foretold. Neither company had ever faced the problem. The record affords no clue as to what action might have been taken if the problem had arisen. It is therefore impossible to conclude that as a matter of reasonable probability *both* Pennsalt and Olin would have built plants in the southeast if Penn-Olin had not been created.

The most favorable assumption that can be made from the Government's standpoint is that either Pennsalt or Olin—but not both—would have entered the southeastern market as an independent competitor if the two companies had not agreed to consolidate their efforts through Penn-Olin. Upon this assumption the effect of Penn-Olin was to eliminate Pennsalt or Olin, as the case may be, as a competitor. But even this hypothesized situation affords no basis for

concluding that Penn-Olin had the effect of substantially lessening competition. Whether or not it did depends upon the competitive impact which Penn-Olin will have as against that which might have resulted if Pennsalt or Olin had been an individual market entrant.

The Government argues that any such comparison is irrelevant and that a determination that Olin (or Pennsalt) would have built its own plant but for Penn-Olin automatically condemns the joint venture.[25] Such an interpretation would cut the heart out of Section 7. The Section denounces a substantial "lessening" of competition. "Lessening" is a word of comparison. It demands that the competitive situa-

[25] The Transcript of Argument reads at pp. 125–126:

"The COURT: Let me ask you: If I should come to the conclusion that as a matter of reasonable probability, absent the joint venture, Olin would have constructed a factory and sold its products in the southeast, if I should come to that conclusion, does the Government contend that from that the Government must * * * win?"

"Mr. FREED: Yes.

"The COURT: Let me ask you: Isn't there a further question as to whether or not the construction of a plant by Olin, sales of products by Olin in the southeast, would have produced a more competitive situation than did the joint venture?

"Mr. FREED: No, Your Honor, that would not be a legitimate question. It is not for the Government and it is not for the courts to weigh the advantages of combinations of competitors and what they give to the economy, and what individual companies give to the economy. * * *"

In arguing that competition created by the joint venture is irrelevant, the Government cites *U.S.* v. *Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950) as an "important precedent." If the decision is susceptible of the interpretation which the Government gives it, it is inconsistent with the views herein expressed. *United States* v. *Bethlehem Steel Corp.*, *supra*, pp. 615–618, the other case relied upon by the Government, is clearly inapposite.

tion which the challenged transaction has brought about be compared with that which otherwise would have existed. Under the Sherman Act competitive conditions before and after a trade restraint must be examined to determine it reasonableness. *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918). A similar comparison is no less essential in determining whether a transaction otherwise within the reach of the Clayton Act will affect competition adversely. If Penn-Olin had the effect of keeping Pennsalt or Olin out of the southeastern market, it runs afoul of Section 7 only if competition generally in the southeast will probably be substantially less under the joint entry by Pennsalt and Olin *via* Penn-Olin than it would have been if there had been individual entry by either Olin or Pennsalt.

In the classical horizontal combination case an appraisal of the competitive potential of each of the combining competitors can be made upon the basis of its prior record. Here there are no past records of Pennsalt or Olin that can be drawn upon to show their individual competitive effectiveness in the southeast, except those which pertain to the 1957–60 period when Olin was acting temporarily as Pennsalt's sales agent. They establish a market penetration by Pennsalt and Olin which was insignificant compared with that of Hooker and AmPot. What the competitive impact of Pennsalt or Olin might have been if either had owned its own plant in the southeast cannot be determined from the record. Nor does the record disclose the competitive effectiveness, in terms of percent of business obtained or otherwise, which Penn-Olin has made since it began business.

Solely as a matter of theory, however, no reason exists to suppose that Penn-Olin will be a less effective competitor than Pennsalt or Olin would have

been. The contrary conclusion is the more reasonable. Penn-Olin should be able to bring to the southeast the aggregate contributions of both companies. After all, Penn-Olin is owned and managed by both Olin and Pennsalt. Whatever manufacturing or marketing techniques, new product usages or other advantageous operational procedures are known to Olin or Pennsalt can be expected to be brought to the attention of Penn-Olin and utilized by it. Neither Pennsalt or Olin has any reason to suppress information which will be of advantage to Penn-Olin. All three companies are in business to make money, and competitive effectiveness is essential to the achievement of this objective.

Before trial, the Government interviewed and corresponded with a number of chemical companies and sodium chlorate producers. In spite of this, no witness was called to testify that the vigor of competition in the sale of sodium chlorate had been, or is likely to be, lessened by Penn-Olin. Nor did the plaintiff introduce any testimony from purchasers of sodium chlorate who complained of any lessening of competition in the industry. Dirkson, Eastern General Sales Manager of AmPot, who called by the Government, testified that there had been no lessening in competition since the establishment of Penn-Olin and that he knew of no facts likely to lead to a lessening in the future.

It is not every lessening of competition which is forbidden by Section 7. The lessening of competition becomes a matter of legislative concern only if it is reduced to a substantial degree, that is to say to such an extent as will injuriously affect the public. *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291, 298 (1930).

Prior to Penn-Olin building its plant at Calvert City, Kentucky, Hooker and AmPot had virtually a

monopoly in the southeast. With Penn-Olin will be three competitors; and when the PPG plant at Lake Charles goes on stream, there will be four. Each of the newcomers is a sizeable company and should be able to give a good account of itself. Actual and in-prospect production in the southeast will have more than doubled since the joint venture was entered into, as shown by the following tabulation:

Company and plant location	Capacity in tons	
	1959	Projected 1962
Hooker—Columbus, Miss.	29,150	32,000
AmPot—Aberdeen, Miss.	12,000	22,500
Penn-Olin—Calvert City, Ky.		26,500
PPG—Lake Charles, La.		[1] 15,000
Total	41,150	96,000

[1] To be achieved gradually on a stepped-up basis.

The advent of Penn-Olin, and later PPG in the southeastern market, together with the increased production in that market, will in all likelihood increase the competition which theretofore existed and bring to buyers of sodium chlorate and to the public the benefits which normally result therefrom.

Congress, in amending Section 7 of the Clayton Act, recognized that all combinations were not anti-competitive, and that in some instances combinations may have the effect of stimulating competition. *Brown Shoe Co.* v. *United States, supra,* p. 319. The probabilities are that Penn-Olin will have that effect.

The Government makes an additional argument founded upon two agreements between Olin and Pennsalt which antedated the joint venture. One, the sales agreement, was made in December 1957; the other, the so-called production agreement, was made in February 1958. It is asserted that the joint venture

consummated and perpetuated the restraints in sodium chlorate imposed by the two earlier agreements which were in themselves illegal. For this reason, the argument goes, even if Penn-Olin might have been lawful as a spontaneous creation, its heritage of restraints under the earlier agreements requires its dissolution. *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947) is cited in support of this proposition.

As subsequently shown the sales agreement and production agreement were not in and of themselves in derogation of the Sherman Act. Nor, as has been previously shown, was the joint venture, considered independently of the prior agreements, in violation of Section 7 of the Clayton Act. The fact that the three transactions—the joint venture and the two agreements—each legal when considered independently, occurred sequentially and as a part of the totality of events, cannot make them, in combination, illegal. *United States* v. *Yellow Cab Co., supra,* is not at variance with this view.

It is the burden of the Government to establish that the joint venture probably will have the effect of substantially lessening competition or that it will tend to create a monopoly in sodium chlorate in the southeastern market. This burden has not been met. The joint venture agreement, in its sodium chlorate aspect, violated neither Section 1 of the Sherman Act or Section 7 of the Clayton Act.

THE AFFECT OF THE JOINT VENTURE ON COMPETITION IN CALCIUM HYPOCHLORITE

As stated, Pennsalt and Olin are substantial competitors, on a nationwide scale, in calcium hypochlorite, one of the nonchlorate chemicals. Together they had 88.8% of the market in 1959 and 76.6% in 1960. The only other competitor of importance is PPG.

The joint venture letter agreement of February 11, 1960 provides that Penn-Olin will manufacture and market not only sodium chlorate but potassium chlorate and perchlorates as well. This agreement was superseded by the definitive contract of October 17, 1961, which limited the operation of the joint venture to sodium chlorate.[26] The Calvert City plant was constructed to produce sodium chlorate only. So that under its present contract and with its existing physical facilities, Penn-Olin cannot manufacture and sell calcium hypochlorite. It is not important that the breadth of the language of Penn-Olin's charter, frequently found in Delaware charters, authorizes it to do so. The Government concedes that it knows of no plans of the defendants to expand the Calvert City plant or to produce any product other than sodium chlorate.[27]

The Government asserts that in the operation of Penn-Olin high officials of Pennsalt and Olin who make the price and marketing and other pertinent decisions for their own companies will be interlocked with each other as officers and directors of Penn-Olin, and that the information concerning the chemical business which each brings to Penn-Olin's meetings will relate not only to their joint product, sodium chlorate, but also to nonchlorates, including calcium hypochlorite, in which they compete. Discussions which will ensue between the Pennsalt and Olin representatives in their common effort to make the sodium chlorate business a success, the Government argues, will inevitably lead to discussions of all phases of the nonchlorate business in which they are in competition, since chlorate and nonchlorate price policies, market-

[26] Although this was after suit had been begun on January 6, 1961, Olin had determined internally in 1960 that the joint venture should be restricted to sodium chlorate.

[27] Transcript of Argument, p. 44.

ing areas, distribution systems and customers coincide or overlap. The Government asserts that in these circumstances it would "defy human nature" for the sodium chlorate partners to maintain an unfaltering zeal to compete in nonchlorates.

No evidence exists of collusion of any type, either actual or threatened, between defendants in the conduct of their nonchlorate operations. A finding of illegality in this area, if it is to be made, must rest upon an inference that a substantially lessening of competition between Pennsalt and Olin in nonchlorates will probably result because of the opportunity which their representatives have to make anticompetitive agreements when they meet in connection with Penn-Olin's affairs. Such an inference is incompatible with the holding in *Maple Flooring Asso.* v. *United States,* 268 U.S. 563 (1925). There it was argued that a trade association consisting of hardwood flooring manufacturers in actual competition with each other which held meetings for the purpose of discussing and exchanging information about costs, commissions, freight rates, sales prices, and other pertinent marketing data, would have the "*necessary* tendency" to unduly restrain competition in violation of Section 1 of the Sherman Act (p. 578). The Court held, however, that in the absence of proof that anticompetitive agreements or concerted action had been reached or attempted, there was no basis for inferring that the association meetings would result in a violation of the law (p. 586).

The probability of competition being substantially lessened by conduct specified in the antitrust statutes need not be established by direct evidence. Inferences that competitive restrictions will probably result are judicially acceptable if supported by adequate evidence. Here the proof shows only an opportunity for

illegal activities. That is not enough. To equate opportunity for wrongdoing with likelihood of its occurrence reflects a cynicism toward business behavior which is without warrant. Presumption of probable wrongdoing cannot be a substitute for its proof.

There is no basis for finding that the joint venture and the activities of the parties thereunder probably will substantially lessen competition or tend to create a monopoly in calcium hypochlorite in violation of Section 1 of the Sherman Act or Section 7 of the Clayton Act.

The Asserted Illegality of Sales and Production Agreements

The Government challenges two agreements entered into by Olin and Pennsalt in December 1957 and February 1958, referred to, respectively, as the "sales" agreement and the "production" agreement. The Government contends that these agreements, in and of themselves and without reference to the joint venture, unreasonably restrained trade in violation of Section 1 of the Sherman Act.[28]

The relevant line of commerce is sodium chlorate. Although the evidence does not permit a statistical market analysis for 1957 and 1958 comparable to that previously made for 1960, there is no reason to believe that the situation was substantially different in the three years. Hence the southeast will be deemed to be the only relevant market in which to determine the competitive effect of the 1957 and 1958 agreements.

THE SALES AGREEMENT

The sales agreement had this background: In October 1957 the productive capacity of Pennsalt at its

[28] Transcript Argument, p. 54.

Portland plant was expanded from 7,848 to 12,392 tons. This enabled it to produce some tonnage which it could not sell on the west coast. At the time Pennsalt was desirous of exploring with Olin the possibility of a sodium chlorate joint venture in the southeast. Distribution by Olin of Pennsalt's production would permit the southeastern market to be jointly tested and enable Pennsalt to work off some of its surplus. Pennsalt thought that such a temporary arrangement might serve to stimulate Olin's interest in a joint venture. This combination of circumstances caused Pennsalt to initiate discussions with Olin which in December 1957 culminated in the agreement.

The agreement provided in substance that Pennsalt would make available to Olin's southern sales organization 2,000 tons of bulk sodium chlorate per year to be sold at prices established by local competition. Olin agreed to sell this sodium chlorate in bulk only to pulp and paper mills in the southeast. Pennsalt agreed to provide technical service upon Olin's request. Pennsalt reserved the right to serve directly only one southeastern pulp mill, Buckeye Cellulose Company at Foley, Florida. The agreement was on a year-to-year basis, but the parties expected it would last for two or three years. The sales agreement was adhered to from the time when it was made until the joint venture agreement was signed.

The effect of the sales agreement was to preclude Olin from selling sodium chlorate manufactured by Pennsalt to anyone anywhere except pulp and paper mills in the southeast. Concurrently, it precluded Pennsalt from selling directly to the pulp and paper companies in the southeast, except Buckeye. This "territorial division" and "customer allocation," the Government asserts, foreclosed competition between

Pennsalt and Olin in substantial geographical areas and consumer uses.

While the Government does not say so in so many words, it apparently takes the position that the territorial and customer restrictions imposed by the agreement constitute *per se* violations of the Sherman Act. It has recently been held, however, that a vertical arrangement by a manufacturer and a dealer-distributor restricting the right of the latter to sell only in specified territories and to designated customers cannot be deemed, as yet, to be a *per se* violation. *White Motor Company* v. *United States*, No. 54 October Term, 1962, 31 U.S.L.W. 4231 (Mar. 4, 1963). This principle, now definitively settled, would appear to have even greater application in the instant case where the arrangement was between a manufacturer and its sales agent.

The Government argues that the sales agreement was not comparable to an arrangement between a manufacturer and distributor, such as was considered in *White Motors*. Rather, says the Government, the Pennsalt-Olin agreement was one between potential competitors since Pennsalt was an actual competitor in sodium chlorate and Olin was considering going into the same business.[29]

The principle that a horizontal market division between competitors is a *per se* violation of the Sherman Act rests upon the premise that all such agreements impose naked restraints on trade and have no purpose except to stifle competition. Because of their pernicious effect on competition and lack of any redeeming virtue, they are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or

[29] Transcript of Argument, pp. 55–57.

the business excuse for their use. *White Motor Company* v. *United States, supra.*

Thus far this principle appears to have been limited to agreements between parties which are actual competitors. The Government admits that it knows of no instance where it has been brought to bear upon potential competitors.[30] Whether it can be applied in the instant case requires consideration *in limine* of the extent to which Olin and Pennsalt were potentially competitive.

The concept of potential competition is, to say the least, a flexible one, and is subject to almost unlimited gradations in meaning. The degree of likelihood of competition may cover a broad range. In point of time its prospect may be remote or imminent. Involved may be companies which are financially weak or strong or both. The problem may concern companies with experience in manufacturing and selling the same product in other relevant markets or companies which are newcomers to the industry. The potential market may be one occupied by other competitors, or one ripe for exploitation because of the absence of competition. A whole gamut of other environmental factors may be envisioned which will bear upon the significance of the so-called potential to compete. Only if the "potential competition" is analyzed and defined in the light of the evidence can the concept be meaningful in the solution of an antitrust problem. To simply describe companies as potential competitors is not enough.

Here, although Pennsalt had a plant in Portland since 1941, it had never been able to develop any business of significance in the southeast. In its agreement with Olin it reserved the right to sell to only one customer, Buckeye. Pennsalt was able to retain

[30] Transcript of Argument, p. 57.

the business of Buckeye only because of a unique circumstance which gave to Buckeye a particular freight advantage in receiving shipments from the west coast. The insignificance of Pennsalt as a competitive shipper from Portland to the southeast in 1960 has been discussed earlier in this opinion. The record is devoid of evidence to permit comparable analysis for 1957; but it does show that in 1957 Pennsalt shipped into the southeastern market only 597 tons. There is no reason to suppose that in 1957 Pennsalt was a more vital competitive factor in the southeast than it was in 1960.

So far as Olin is concerned, at the time when it entered into the agreement, it had never manufactured sodium chlorate for sale or sold it anywhere. Although it was studying the desirability of going into the business no decision to do so had been made.

In short, when the sales agreement was made, both Pennsalt and Olin were far removed from the point of becoming actual competitors in the southeastern market, or anywhere else. To say that they were potential competitors stretches the concept to the point where, in an antitrust context, it is virtually meaningless. Their relationship provides no basis for applying the *per se* violation rule applicable to actual competitors who agree to divide territories and customers between themselves.

So that whether the sales agreement is scrutinized simply as a contract between a manufacturer and his sales agent, analogous to the manufacturer-distributor-dealer relationship dealt with in *White Motors,* or is examined with emphasis upon the status of the parties as potential competitors, the "rule of reason" read into the Sherman Act by *Standard Oil Co.* v. *United States,* 221 U.S. 1, 59–62 (1911) must be applied, and the evidence examined to ascertain whether the re-

straint of trade which the sales agreement is said to have imposed, was unreasonable.

The sales agreement did not impose the severe territorial or customer limitations which the Government claims. It did not preclude Olin from manufacturing sodium chlorate or from purchasing it from Pennsalt's competitors; and if Olin did either it was free to sell the product to anybody outside of the southeast, and to anybody in the southeast other than pulp or paper mills.

The agreement did not prevent Pennsalt from selling sodium chlorate to anyone in the United States, except pulp and paper mills in the southeast. All that it did was to prevent Pennsalt from selling through its own personnel sodium chlorate to pulp and paper mills in the southeast. Even as to the latter business Pennsalt competed through the instrumentality of Olin, much as AmPot did through the Solvay Division of Allied Chemical.

The business which Olin was able to generate was not large. The sales which it made under the agreement in 1958 amounted to 1,113 tons, and in 1959 to 1,329 tons. In 1960, after Pennsalt and Olin had agreed to form Penn-Olin, 3,203 tons were sold. Olin enjoyed contacts and good will with the buyers which Pennsalt lacked. The probabilities are that Pennsalt was able to compete more effectively through Olin than it could have without Olin's assistance. In 1960, the year of its largest southeastern shipments, and with Olin's help, Pennsalt was only able to supply 9% of the total 47,035.76 tons shipped into the market. Of the remaining amount, Hooker and AmPot together supplied 91%. Even if the sales agreement be regarded as eliminating Pennsalt from competing for the business of the southeastern pulp and paper manufacturers, the exclusionary effect of the agreement was not substantial.

So far as a Sherman Act violation is concerned, the result must turn on the significance of the business practices in the terms of restraint of trade. *United States* v. *Masonite Corporation*, 316 U.S. 265, 280 (1942). The sales agreement imposed no unreasonable restraint of trade upon sodium chlorate in the southeast, and did not violate Section 1 of the Sherman Act.

THE PRODUCTION AGREEMENT

The second pre-joint venture agreement which the Government attacks is the so-called "production agreement" entered into on February 3, 1958. This is reflected in the memorandum written the following day by Mr. Logan, Vice President of Olin. There he details a visit which he had the preceding day with top officials of Pennsalt. The memorandum states:

> "Drake (Pennsalt's president) outlined their long-range interest in chlorate in the south and suggested that there was sufficient that both Pennsalt and OM had to contribute to seriously consider joint activity.
>
> * * * * *
>
> "It is felt that neither OM nor Pennsalt should move in the chlorate or perchlorate field without keeping the other party informed and I agreed to do so.
>
> * * * * *
>
> "Either party is to bring to the attention of the other any unusual aspects of this business which might make it desirable to proceed further with production plans."

There is no justification for the claim that this agreement, destroyed all opportunities for competition between Pennsalt and Olin and that plans for independent eastern production by each company were thereby thwarted. This was neither the intention nor the effect of the agreement.

Its purpose, according to Drake, was to make certain that if one party decided to "go it alone" while the joint venture was under consideration, the other party would be so advised since it would be futile for the latter to give further consideration to the joint venture. That the agreement was not designed to curtail individual market entry or to thwart plans therefor is borne out by activities of the parties after the understanding had been reached.

In September 1958—seven months after the agreement—the agenda for Pennsalt's annual management meeting raised for firm decision the question whether it would build a sodium chlorate plant, and if so, where. At the meeting held in November 1958, tentative approval was reached to build a 30,000-ton sodium chlorate plant at Calvert City, Kentucky, 20,000 tons of which would be sold as such and 10,000 tons of which would be devoted to the production of ammonium perchlorate.[21] The action taken was based upon a study of the capital requirements and profitability of the venture reflected in a report of October 31, 1958 from A. S. Woodward, manager of engineering, to Vice President LaLende. The purpose of Pennsalt in going into perchlorates was to enable Pennsalt independently to undertake the manufacture of sodium chlorate. Pennsalt's interest in a plant of its own continued throughout 1958.

So far as Olin is concerned, the record is replete with evidence that its interest in building a sodium chlorate plant of its own was not terminated by the

[21] Ammonium perchlorate is used as an oxidizer for high energy solid state missile propellants. Sodium chlorate is the raw material out of which ammonium perchlorate is made. The profit obtainable from the latter was much greater than that which could be derived from the former. A plant which produced both products would yield an overall rate of return satisfactory to Pennsalt.

production agreement. Illustrative is the so-called Whither report of the Chemicals Division which was made on April 10, 1959. This recommended that Olin enter the sodium chlorate business immediately by constructing a 15,000-ton sodium chlorate plant adjacent to its existing chlorine-caustic soda plant at Mackintosh, Alabama. At a meeting on April 16, 1959, between representatives of the Chemicals Division and corporate staff, the proposed Mackintosh project was not deemed sufficiently attractive to be approved. The matter was not dropped, but it was determined that there should be further study on certain specified points. In October 1959 the Chemicals Division filed another Whither report which made a definitive recommendation that sodium chlorate be a wholly Olin project but that the plant be located at Chattanooga instead of Mackintosh. Olin's corporate staff did not disapprove or otherwise act upon the October 1959 report prior to the joint venture decision of 1960.

In view of this evidence it is impossible to attribute to the production agreement the stultifying affect on individual competition by Olin and Pennsalt which the Government would ascribe to it. The agreement did not constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

A judgment will be entered dismissing the complaint as amended.

The foregoing opinion constitutes the findings of fact and conclusions of law required by F.R.C.P. 52(a).

At: Wilmington, Delaware.

Date: May 1, 1963.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 2282

UNITED STATES OF AMERICA

v.

PENN-OLIN CHEMICAL COMPANY, OLIN MATHIESON CHEMICAL CORPORATION, AND PENNSALT CHEMICALS CORPORATION

ORDER ENTERING JUDGMENT

AND NOW this 15th day of May, 1963, this case having come on for final hearing on the merits, and having been fully heard upon oral testimony, depositions, exhibits, and argument of counsel for the respective parties, and having been maturely considered by the Court, and Findings of Fact and Conclusions of Law having been filed, it is, for the reasons set forth in the opinion of this Court dated May 1, 1963:

ORDERED that judgment be and it hereby is entered in favor of each of the defendants and against the plaintiff.

/s/ EDWIN D. STEEL, JR.,
United States District Judge.

Approved as to form:

/s/ DANIEL J. FREED,
Attorney for Plaintiff.

U.S. GOVERNMENT PRINTING OFFICE: 1963